T. K. Harvin & Sons, Incorporated *and* Teamsters Local 312, a/w International Brotherhood of Teamsters, AFL–CIO *and* Teamsters Local 929, a/w International Brotherhood of Teamsters, AFL–CIO *and* Garry Warner *and* Francis Kuhn

T. K. Harvin & Sons, Incorporated *and* Teamsters Local 929, a/w International Brotherhood of Teamsters, AFL–CIO, Petitioner. Cases 4–CA–21582, 4–CA–21599, 4–CA–21642, 4–CA–21617, 4–CA–21842, and 4–RC–18087

February 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 10, 1994, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a cross-exception and an answering brief to the Respondent's exceptions and brief, and the Charging Party filed a response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] as modified and to adopt the judge's recommended Order as modified.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, T. K. Harvin & Sons, Incorporated, Wilmington, Delaware, and Chester, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 2(b) and reletter all subsequent paragraphs.

''(b) Remove from its files any reference to the unlawful discharge of Joshua Tunnell, and notify him in writing that this has been done and that the discharge will not be held against him in any way.''

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Case 4–RC–18087 is severed from Cases 4–CA–21582, 4–CA–21599, 4–CA–21642, 4–CA–21617, and 4–CA–21842; that all the objections to the conduct of the election filed in Case 4–RC–18087 are overruled; that Case 4–RC–18087 is remanded to the Regional Director for Region 4; that the ballots of Glen Brightwell and Joshua Tunnell be opened and counted by the Regional Director in accordance with the Board's Rules and Regulations; and that he prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

[1] The Respondent's request for oral argument is denied as the record and briefs adequately present the issues and positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by discharging employee Joshua Tunnell, we rely also on the admission, in late March or early April 1993, by the Respondent's vice president, Keith Harvin, to employee Francis Kuhn that the Respondent had discharged Tunnell ''because he had brought the Union here.'' However, we do not rely on any reference the judge made to the fact that the Respondent discharged two other employees, Garry Warner and Jeff Walker, who were active in the union campaign. As the judge noted, the legality of their discharges was not at issue in this proceeding.

In adopting the judge's finding that the Respondent unlawfully engaged in the interrogation of employees, Chairman Gould and Member Browning find it unnecessary to rely on *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

[4] In the absence of exceptions, we adopt, pro forma, the judge's findings that the challenge to the ballot of Glen Brightwell should be overruled and that the challenges to the ballots of Thomas Maxwell and Garry Warner should be sustained.

[5] The judge inadvertently omitted an expunction remedy for employee Joshua Tunnell who was unlawfully discharged. We shall correct the recommended Order and notice to include this remedy.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT (a) solicit your complaints and grievances, promising you increased benefits and improved terms and conditions of employment if you abandon your support for the Teamsters Local 929, a/w International Brotherhood of Teamsters, AFL–CIO; (b) interrogate you concerning your union sympathies; (c) promise you a wage increase and an award of a dispatcher's job in order to discourage you from supporting Teamsters Local 929; (d) create an impression that your union activities are under surveillance by asking you how a Teamsters Local 929 meeting had been; (e) interrogate you concerning your activities on behalf of Teamsters Local 929; and (f) tell you that another employee had been discharged because of his union activity.

WE WILL NOT discharge you because you have joined, supported, or assisted any union.

WE WILL NOT in any like or related manner restrain, interfere, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Joshua Tunnell who was unlawfully terminated on March 29, 1993, to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed by him and make him whole for any loss of pay he may have suffered as a result of his discharge.

WE WILL remove from our files any reference to the discharge of Joshua Tunnell, and notify him in writing that this has been done and that the discharge will not be held against him in any way.

T. K. HARVIN & SONS, INCORPORATED

Richard Wainstein, Esq., for the General Counsel.
Stephen J. Cabot, Esq., Maria L. Petrillo, Esq., Reed J. Slogoff, Esq., and *Frederick M. Walton Jr., Esq. (Harvey, Pennington, Herting & Renneisen, Ltd.)*, of Philadelphia, Pennsylvania, for the Respondent and the Employer.
Neal Goldstein, Esq. and *Robert F. Henninger, Esq. (Freedman and Lorry, P.C.)*, of Philadelphia, Pennsylvania, for the Charging Party and Petitioner Teamsters Local 929.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Charges were filed by Teamsters Locals 312 and 929, a/w International Brotherhood of Teamsters, AFL–CIO (the Union) and by named individuals[1] against T. K. Harvin & Sons, Incorporated (Respondent). Complaints were issued collectively alleging that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), collectively, in that allegedly Respondent's vice president, Keith Harvin, (1) solicited employees' complaints and grievances, promised its employees increased benefits, and improved terms and conditions of employment if they abandoned their support for the Union; (2) unlawfully discharged its employee Joshua Tunnell[2]; (3) interrogated an employee concerning the employee's union sympathies; (4) promised an employee a wage increase and an award of a dispatcher's job in order to discourage the employee from supporting the Union; (5) created the impression among its employees that their union activities were under surveillance by Respondent by asking an employee how a union meeting had been; (6) interrogated an employee concerning the activities of its employees on behalf of the Union; and (7) told an employee that other employees have been discharged because of their union activity. Respondent denies violating the Act.

By Order entered November 4, 1993, the above-entitled unfair labor practice cases were consolidated and they were further consolidated with Case 4–RC–18087 which now involves resolving the issues raised by (a) the National Labor Relations Board (the Board) challenges to the ballots of Tunnell, Thomas Maxwell, and Warner,[3] and the Union's challenge to the ballots of Glen S. Brightwell[4] and Kathy Borrelli on the ground that they are relatives of the Employer; and (b) the objections of T. K. Harvin & Sons, Incorporated to conduct allegedly affecting the results of the election.

A hearing on these consolidated cases was held before me in Philadelphia, Pennsylvania, on March 1–4, 7, and 8, 1994. Upon the record, including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Wilmington, Delaware,[5] is engaged in the wholesale distribution of produce to customers in Delaware, New Jersey, and Pennsylvania. The complaint alleges, the Respondent admits, and I find that at all times material, Respondent has been an employer engaged in commerce within

[1] Garry Warner and Francis Kuhn.

[2] To the extent that one of the complaints alleged the unlawful termination of Warner, it was dismissed at the hearing on counsel for the General Counsel's motion because Warner failed to cooperate or appear at the hearing. Also, that portion of one of the complaints alleging that Respondent's employee, Jeff Walker, was unlawfully terminated was amended out at hearing based on a non-Board settlement.

[3] These three were challenged because their names did not appear on the voter eligibility list. As noted above, at the request of counsel for the General Counsel the allegation that Warner was unlawfully terminated was dismissed at the hearing since Warner failed to cooperate or appear at the hearing. Maxwell also did not appear at the hearing. The Union, at the hearing herein, withdrew its contention that Maxwell is still an employee.

[4] During the hearing herein the Union withdrew its challenge to Brightwell. His ballot, therefore, should be counted.

[5] At the time of the events involved herein, Respondent also had a facility and office at Chester Pennsylvania. It was in the process of moving its operations from Chester to Wilmington.

the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Hugh Donovan, an organizer for the Union, testified that he started an organizing campaign at Respondent's Chester facility in early March 1993.[6] While he was posting union literature on cars Keith Harvin came out of the Chester facility and said, ''You must be union.'' They shook hands. Later, Thomas Harvin, Keith's father, came over and shook Donovan's hand.

At the time of the organizing drive, Tunnell drove a truck for Respondent.[7] During the day he made deliveries to Respondent's customers. At night he picked up special order items at the Philadelphia Ford Distribution Center (the Distribution Center).[8] More specifically, he was given an order sheet by James Satchell, who is Respondent's second-shift supervisor, which listed what produce he was to pickup at the Distribution Center and which vendors most likely would have the items.[9] Also, he took any returns Respondent might have back to the Distribution Center. The returns were handled first. When he obtained an item listed Tunnell circled the number of the items and the involved vendors' name. If he was unable to obtain the items at the vendors listed, Tunnell would telephone back to Respondent's facility and ask Satchell for instructions. Also, Tunnell telephoned Respondent's facility from the Distribution Center around 10 p.m. to find out what additional items Respondent needed. He would write these on the back of the order sheet he was given earlier. When he completed his task at the Distribution Center he would return with the produce to Respondent's facility. According to Tunnell's testimony, David Tinnin, who worked on the night crew at Respondent's facility and who was responsible for having the daytime delivery trucks loaded during the night, would check the produce Tunnell brought back from the Distribution Center and Tinnin would place an ''X'' next to Tunnell's circle. Tunnell would then give the order slip to Satchell, and then he, Tunnell would go home. At the time of his discharge, Tunnell performed the night run to the Distribution Center three nights a week.[10]

Mike Anderson, who has worked for Respondent for 10 years as a truckdriver, testified that 3 years ago he served as a night driver for about 6 months; that it is the night truckdriver's responsibility to check the quality of the items picked up at the Distribution Center since no one else checks the quality until it is delivered to the customer; that ''[a]lot of times'' broccoli rabe is iced; that broccoli rabe ''just has to be iced''; and that under company policy, as he understood it, the first time a night driver brought back bad produce he could get a ''pretty good chewing out, and the second time, I don't think they'd be doing the night truck no more.'' On redirect, Anderson testified that the night checker ''[w]hoever it was back then would probably—I think probably checked both [quantity and quality] real quick.''

Timothy Kent Harvin, who is president of Respondent and who owns 50 percent of the Company,[11] testified that his chief responsibility is buying fresh produce, vegetables, and fruits. Respondent delivers to approximately 200 or 300 ''white tablecloth restaurants,'' hotels, and institutions throughout the involved tristate area. Kent Harvin would buy at the Distribution Center in the early hours of the morning. Items which were not available at the Distribution Center in the morning would be priced up in the evening by Respondent's night driver. Also, the night driver would pick up, at the Distribution Center, items Respondent did not have in stock which were specialty items for which Respondent did not regularly receive orders. Satchell telephones Kent Harvin around 7 p.m. and tells him what Respondent needs to be picked up at the Distribution Center by the night driver. Kent Harvin would tell Satchell were the merchandise could be bought at the Distribution Center, based on his observations, which were made that morning. Kent Harvin testified that he would give Satchell a list of three or four places that handled the items and Satchell would write them down and give a copy of the sheet to whoever the night truckdriver was. According to Kent Harvin's testimony, the night driver called Satchell from the Distribution Center for ''add-ons'' which the night driver would write on the sheet. Kent Harvin testified that when the night driver returned to the warehouse he would go to Satchell and ''they [Satchell and the night truck driver] would reconstruct a cleaner list so it would be legible down the road when it came time to pay the bills of where he had bought merchandise that night.'' While the sheet has the words ''order sheet'' on the top, Kent Harvin refers to it as the night truck or the market sheet. According to Kent Harvin's testimony, the night truckdriver was responsible for checking the quality of items on the list because the day crew never had a chance to see this merchandise. Kent Harvin testified that the night truckdriver did not pick up at the Distribution Center items which were going to be kept in Respondent's warehouse for several days; and that it was his job to buy items for stock during the day.

Regarding his role in the union campaign, Tunnell testified that he, Walker, who worked in Respondent's warehouse, and Warner, who drove a truck for Respondent, discussed having a union represent Respondent's employees.[12] On the Monday, Warner was terminated which was March 22, according to Tunnell's testimony, at about 6 a.m. he and Warner were standing about 5 to 10 feet from one of the doors at Respondent's Chester warehouse. The door was open. Tunnell testified that he and Warner had their trucks running

[6] All dates are in 1993 unless otherwise stated.

[7] He was hired by Respondent in September 1992. Tunnell received a $10-a-day raise from Respondent in October 1992. For 18 years before working for Respondent he worked for Kroll's Seafood and Produce in Wilmington, Delaware. Tunnell purchased produce for his prior employer.

[8] The Distribution Center, which is comprised of about 40 different businesses or vendors, is the main distribution point of produce in the tristate area of Pennsylvania, Delaware, and New Jersey.

[9] Thomas Harvin, who is the father of Respondent's co-owners Kent and Keith Harvin, trained Tunnell regarding how to check the produce to be sure it is fresh.

[10] Another of Respondent's drivers, John McConnell, performed the night run on the other two nights. The night run is made Sunday through Thursday.

[11] His brother Keith, who is vice president of the Company, also owns 50 percent of Respondent.

[12] Prior to its amendment, the July 26 consolidated complaint alleged that Walker and Werner were terminated by Respondent on March 29 and 24, 1994, respectively.

and they were discussing union authorization cards when Keith Harvin came out the door and said, ''Get them goddamn trucks moving now''; and that when he returned from making deliveries that day he was told that Warner was fired. On cross-examination Tunnell testified that two diesel trucks running make a lot of noise that he and Warner did not raise their voices; and that he was careful when he spoke about the Union and to the best of his knowledge no one in management ever found out that he was working for the Union.

On either Sunday or Monday night, March 21 and 22, respectively, according to the testimony of Tunnell, he picked up two cases of broccoli rabe at the Distribution Center. Tunnell testified that both of the cases were purchased on the same night; that it was not bad; that he inspected the broccoli rabe before he took it and it was fresh; and that he brought the two cases of broccoli rabe, along with other items, back to Respondent's warehouse and Tinnin checked out the order ''item by item.'' On cross-examination Tunnell testified that Tinnin does not just count the boxes but rather ''[h]e checks the quality of the produce.'' Subsequently Tunnell testified that the order sheet he received from Satchell indicated that he should go to a vendor named Pinto in the Distribution Center to pickup the broccoli rabe; that when he went to get the truck at Respondent's facility Satchell said, ''[T]hey got broccoli rabes at Pinto and Kent said for you to check them''; that he told Satchell that he would telephone him when he arrived at Pinto; that later he telephoned Satchell, told Satchell he had two good cases of broccoli rabe and Satchell told him to bring them back; that when he checked the two cases of broccoli rabe at Pinto he removed the ice in the cases and he checked through to the bottom of the cases; that he did not put the ice back in the two cases; that Tinnin opened the cases and checked the contents; and that he drove the night run three nights that week, namely, Sunday, Monday, and Tuesday. On further cross-examination Tunnell testified that rotten broccoli rabes smells bad and the odor could be detected from at least 15 feet away; and that ice and cold weather can sometimes mask the smell.

Tinnin testified that as the third-shift checker he just counted the cases of broccoli rabe to make sure that he had the right number of cases; that ''it would say broccoli on the box'' and it was not his job to open the box; and that it was not his job to check the quality of the merchandise and he did not have the time since he is responsible for seeing that a total of approximately 1200 cases of produce are loaded on the delivery trucks during the night. On cross-examination Tinnin testified that he tries not to leave produce exposed to the weather for too long if it is cold because broccoli rabe ''can wilt, it can get bad'' if it is left out in the cold weather for a long period of time. Subsequently, Tinnin testified that the broccoli rabe would not normally have to be iced in March.

Kent Harvin testified that broccoli rabe is an Italian vegetable that is bought primarily by Italian restaurants or specialty oriented retailers who have an Italian trade; that it should not be very difficult for Respondent's night truckdriver to discern the difference between good and bad broccoli rabe; that when the buds of the broccoli rabe start to flower and turn yellow it is a sign that it is starting to deteriorate; that as the broccoli rabe goes bad it begins to smell and as its condition deteriorates further, the smell gets worse; that he buys broccoli rabe at the Distribution Center 25 to 40 times a year; that while he has seen broccoli rabe without ice, he would never buy it without ice because he would be skeptical as to how it had been handled; and that ice should not be taken out of the container and if it is for inspection purposes, the ice should be put back in again.

On or about March 22, a little after 12 noon, according to his testimony, Donovan met Tunnell at Delaware and Washington Avenues in Philadelphia and gave him some union authorization cards. Donovan testified that during this meeting Tunnell said, ''Harvin was giving . . . [him, Tunnell] a bad time.'' Donovan could not remember if Tunnell mentioned anything about bad broccoli rabe during this meeting. Tunnell testified that McConnell[13] telephoned the Union to arrange for him to pick up union authorization cards; that he was not sure of the day or the date but he had a run in south Philadelphia on March 22 or 23, which assertedly would have been a Tuesday or Wednesday and he obtained the union authorization cards from Donovan; that he gave some of the cards to Walker; that he ''got about four signed and handed several of them out to the rest of the other drivers, and they had in turn . . . handed them back to Jeff or mailed them to the Union.''[14] On cross-examination Tunnell testified that he discussed his hours with Donovan when he picked up the authorization cards; and that he told Donovan that he believed that Respondent wanted him to work 5 days and 5 nights. This meeting occurred on March 23 since Warner was fired on March 22 and Tunnell did not know about it until the afternoon of March 22. Warner was supposed to bring the union authorization cards to work on March 23.

Walker testified, regarding the union authorization cards, that Tunnell was to take care of all the drivers and he, Walker, was to take care of the warehouse workers.

According to Kent Harvin's testimony, on March 22 Respondent had orders for a couple of cases of broccoli rabe. Kent Harvin testified that the customer had specified Andy Boy broccoli rabe, which is handled by only one vendor, Pinto Brothers, at the Distribution Center; and that he sent Tunnell to Pinto. Kent Harvin sponsored Respondent's Exhibit 2 which assertedly is the draft of the night truck market list for ''3–22–93.'' He testified that the list refers to those items picked up on March 22 and that the document introduced herein as Respondent's Exhibit 2 is the final night truck market list worked up by Satchell and Tunnell after he returned to Respondent's warehouse with the commodities listed;[15] that after the entry ''X2 B Rabe Andy boy Pinto''

[13] According to Tunnell's testimony, McConnel was subsequently terminated. According to Respondent's list of employees terminated, G.C. Exh. 12, a John McConnell ''resign quit'' on ''11–7–93.''

[14] Tunnel estimated that Respondent had about 10 day run drivers when he was terminated on March 29.

[15] Tunnel testified that the order sheets or night driver's market lists, introduced herein as, R. Exhs. 1 and 2, were not the original lists which were given to him when he went to the Distribution Center; that he had never seen these ''MARKET LIST's'' before they were shown to him at the hearing herein; that the order sheet for his night run was prepared by Satchel before he left for the night run; and that he did not help Satchel redraft an order sheet after he completed his night run. When faced with this, Respondent's attorney stated that he would ''withdraw the exhibit [R. Exh. 1 which refers to March 23 and which assertedly would have been generated

Continued

on Respondent's Exhibit 2 there is written ''Return'' which shows ''that they were going to be, or were returned. The word return is written where the price would be, and if we were going to return it, price becomes irrelevant;'' that regarding the handwritten ''return'' on the list ''that's, a note is made that, a note is noted that we are going to return them. Therefore, when it came time to do the bills a week or two later, we'd see that they were returned''; that with respect to the prices listed on Respondent's Exhibit 2, Tinnin would get on the phone and call the vendors listed on the sheet and he would speak with Kent Harvin about 4:30 a.m. and they would discuss how much the vendor charged and what to charge the customer; that subsequent to his discussion with Tinnin, Tinnin would put the price on the night truck market list; and that Tinnin needed the prices so he could complete the invoices which the delivery drivers would take with their deliveries later that morning.[16]

Paul Donati, Giunta's Thriftway's produce manager, testified that while Giunta's has a major produce supplier, Giunta's deals with Harvin and a few other smaller suppliers, because some of the time Giunta's cannot get what it wants as far as quantity and/or quality from the major suppliers and the smaller suppliers can deal on a shorter notice; that before March 1993 he did not have any problems with the quality of the produce delivered by T. K. Harvin; that in March 1993 Giunta's had problems with two cases of broccoli rabe delivered by T. K. Harvin; that he had asked T. K. Harvin salesman, Mike Doyle, if he could get a case of Andy Boy broccoli rabe and Doyle told him that he had seen the Andy Boy brand downtown; that Doyle telephoned him later that day indicating it was available; that this occurred early on in our relationship'';[17] that his assistant produce manager, Jim Thomas, signed for receipt of the case of broccoli rabe on March 23 (R. Exh. 14–1); that he did not see the case of broccoli rabe when it came off the truck and when he opened it he told Thomas that Giunta's could not sell it; that there was no ice on the broccoli rabe and it was not as fresh as Doyle said it would be; that the florets were dead yellow and the greens were dried up at the end and withered up; that if someone purchased good broccoli rabe on March 22 it would not have been in the condition of the broccoli rabe he received on March 23 ''unless it was stored in an oven. There was basically no, and even then, the florets wouldn't have turned yellow''; and that ''I talked to Mike later that day and told him, you know, what the product looked like and asked him if he could have it picked up the following day, issue me a credit, and if he thought that the product downtown was better, then reorder for me, and I would have the customers, you know.'' On cross-examination Donati testified that before Giunta's received the first case of broccoli rabe from T. K. Harvin, Doyle said he had seen the product at the Distribution Center and it ''looked real nice''; that when he spoke to Doyle after he looked at the first case, he told Doyle that it was nowhere near what he expected and he wanted to send it back and get a credit on it; that Doyle said he did not know what happened and he told Doyle ''[I]f it's that nice, can you get me another one''; and that Doyle said he would have another case sent the following day.

According to Kent Harvin's testimony, between 10 and 11 a.m. on Tuesday, March 23, he received a telephone call from one of Respondent's salesmen regarding the broccoli rabe shipped to Giunta's, and Kent Harvin told the salesman to tell Giunta's to send the case back to Harvin the next day and he would try to get them another case; that he called Respondent's Chester warehouse, which was across the street from Respondent's offices and indicated that he wanted to speak to Tunnell when he returned from his day run; that subsequently he saw the ''hot sheet'' which indicated that the other box of broccoli rabe had been rejected by Hercules;[18] and that when Tunnell returned to the warehouse that day Kent Harvin told him as follows:

> What the fuck is your problem? You're buying shit on the night truck. I got customers calling me, I got salesmen calling me, telling me that the stuff is shit. Your job is to check the stuff. If this is the way you are going to do your job, who the hell needs you.

On March 23 Kent Harvin, according to Tunnell's testimony, told him upon his return from his deliveries that ''[y]ou bought bad goddamned broccoli rabe—the next time you buy bad broccoli rabe, I'm going to take it out of your pay.'' Tunnell testified that he said, ''[O]kay.'' This occurred between noon and 2 p.m. That evening Tunnell returned a case of broccoli rabe to the Distribution Center. Tunnell testified that he did not know if this case contained bad broccoli since he did not look at the broccoli. He did notice that the case had been re-iced. It had already been placed in his truck. On cross-examination Tunnell denied picking up a case of broccoli rabe the same night he returned the case of broccoli rabe. Subsequently, he testified that he did not think that he picked up a case of broccoli rabe that night.[19] And then Tunnell testified that he had no recollection at all

by the same procedure used to generate R. Exh. 2 which assertedly is the market list for March 22] at this time, and bring in James [Satchel] to testify.'' Satchel was not called to testify. R. Exhs. 1 and 2 were sponsored by Kent Harvin.

[16] It is noted that the invoice's taken by the delivering driver for the delivery to Giunta's (R. Exh. 14) and the one for Hercules (R. Exh. 11) both have the prices for the broccoli rabe. The night truck market list (R. Exh. 2) does not have a price for broccoli rabe albeit it contains prices for other items on the list.

[17] Frank Giunta, the owner of Giunta's which is located in Westchester, Pennsylvania, testified that as of March 1993 he had a business relationship with T. K. Harvin for about 1 year and that Giunta's ordered about $1500 worth of produce weekly from T. K. Harvin. Giunta testified that before March 1993 nothing out of the ordinary occurred with T. K. Harvin.

[18] Regarding the Hercules shipment, Kent Harvin sponsored the involved trip sheet (R. Exh. 9), the involved ''Hot Sheet'' (R. Exh. 10), and the involved delivery invoice (R. Exh. 11). Hercules would not accept delivery of the ''bad'' broccoli rabe and the delivery driver on March 23 immediately took the case back.

[19] Tunnel was shown an order sheet dated March 23, 1993, and another one dated March 22, 1993 (R. Exhs. 1 and 2), respectively. As noted above, Tunnell testified that they were not the original order sheets he used those nights because the ones he used had the names of the vendor on them where he picked up the produce and they did not have the prices. Both of the exhibits do have ''X''s and circles around the number of cases. Also, Tunnell pointed out that there was no writing on the back sides of the R. Exhs. 1 and 2 covering the notes which would be taken when he telephoned Satchell at 10 or 11 p.m.

whether or not he picked up broccoli rabe on the night of March 23.

Late in the afternoon of either March 23 or 24, according to the testimony of Walker, he and Keith Harvin were alone in the warehouse office and Keith said, ''[T]hat bozo was out in the parking lot trying to stir trouble.'' According to Walker's testimony, he asked Keith Harvin who he was referring to and Keith Harvin said his name was Hugh Donovan and that he had been there before causing trouble. On cross-examination Walker testified that he did not see Donovan on this occasion and at this point in time he did not know who Donovan was by name. Keith Harvin testified that he never said to Walker or anybody else on any occasion that Donovan to as a bozo; that he never said to Walker ''that bozo is out in the parking lot trying to make trouble''; and that he told Walker that ''Hughie [Donovan] was out front, and he was, he had job to do.''

On either Tuesday, March 23, or Wednesday, March 24, according to the testimony of Walker, after he had received the union authorization cards Keith asked him if there were any problems with anybody. More specifically, Walker testified that while they were alone outside the cooler he and Keith Harvin engaged in the following conversation:

> He asked me if I was aware of anybody who had any problems, whether it be money or the time or day they were putting in, and I said no. And, I asked him why, and he said cause sometimes—by the time you find out about it, its too late to do anything about it.

On cross-examination Walker testified that Kent and Keith have, in the past, asked him if there were any problems with anything and they would occasionally ask how the employees were doing. Keith Harvin testified that probably every workday he asked Walker if there were any problems regarding fruits and produce; and that about once a week he would ask Walker, who was supervising, if there were any problems involving work, money, the employees, and overtime.

Regarding the night run on March 23, Kent Harvin testified that Tunnell took the box of broccoli rabe which Hercules Country Club rejected back to Pinto Brothers at the Distribution Center;[20] and that Tunnell picked up another box of broccoli rabe at Pinto Brothers[21] for delivery to Giunta's Thriftway the next day, Wednesday, March 24.

With respect to what occurred on Wednesday, March 24, Donati testified that he signed Respondent's Exhibit 14-2 which is a credit for the first case of broccoli rabe which was assertedly picked up at Giunta's on March 24, 1994, ''[i]t says poor quality on the reason why it was picked up. And Giunta's was issued a credit on this broccoli rabe.''; that regarding the second case, Giunta's ''didn't receive a credit slip. What we did was, we worked it off the total dollar figure of the next order'';[22] that he was told to throw the second case out; that the second case looked basically the same as the first, if not worse; that he telephoned Doyle who said he would get back to him; that whenever Giunta's gets something bad it has to store the item until the next day until it is picked up and the product to be returned takes up space in the backroom and it gets pushed around ''[a]nd if . . . [Giunta's] night people . . . don't know that it's being stored to send back. . . . they'll maybe try to redo some of it, and get rid of the rest''; that Doyle called him back and said, ''[J]ust . . . throw it out. I talked to my people, throw it out. We'll get credit for you''; that ''if this were to continue, I have enough suppliers, there's enough people out there that want my business that I would have gone elsewhere eventually, yes''; that the approximately dozen small suppliers of produce in Giunta's delivery area are very competitive; and that it would have been relatively simple for Giunta's to decide to cancel this relationship.[23] On cross-examination Donati testified that there was no other small supplier that Giunta's deals with like T. K. Harvin that gets most of its produce from the Philadelphia Distribution Center; that if broccoli rabe is subject to subfreezing temperatures ''the leaves will turn a dark, dark green. As if they were frozen. And then when they thaw out . . . they'll be, a little bit withered . . . but they'll stay a dark green''; and that he told Doyle regarding the second case that there was no ice on it, the florets were yellow, the leaves were all dried up, and it looked like an old case of broccoli rabe. On redirect Donati testified that he could not ''honestly . . . [say] yes or no'' that the second case was actually the first case returned right back to Giunta's. Subsequently Donati testified the two cases were not subjected to subfreezing temperatures for the following reasons:

> Because had they been, the florets wouldn't have yellowed. They still would have been, in the green, the green coloring. Had those been frozen, the florets would have been a darker green also, along with the leaves. Just, and just the top part.

[20] Kent Harvin testified that Hercules Country Club needed the case of broccoli rabe for a function on March 23 and he could not get Hercules another box and get it to the Country Club in time for the function. Keith Harvin sponsored R. Exh. 12, which is a return slip for the case of broccoli rabe returned to Pinto Brothers on March 23. The slip is signed by Dave, who Kent Harvin testified, works for Pinto Brothers.

[21] Kent Harvin sponsored the ''3–23–93 NITE TRUCK MARKET LIST'' which lists ''I B. Rabe ANDY BOY PINTO'' (R. Exh. 1). Kent Harvin also sponsored R. Exhs. 17, 18, and 19 which are for petty cash. Kent Harvin testified that Tunnell was paid $40 a night as casual labor for his night run to the Distribution Center, and that Tunnell was paid a flat rate for this run no matter how much time he spent at the Distribution Center.

[22] It is noted that while there is an invoice to Guinta's dated ''3–23–93'' signed by Guinta's assistant produce manager, Thomas, for the first case of broccoli rabe (R. Exh. 14-1), and an invoice to Guinta's dated ''3/24/93'' signed by Donati for the pickup (along with the delivery of 15 cases of another product) of the first case of broccoli rabe, R. Exh. 14-2 there is no document which covers or invoices the delivery of the second case of broccoli rabe to Giunta's. And as noted above, Donati testified that he did not subsequently receive a credit slip for the second case. It would seem if the second case were delivered as an even exchange of the first there would have been no need to give Giunta's a credit on the first. If this approach was not taken, it would seem that, as there assertedly is documentation invoicing and crediting the first, there should have been some documentation invoicing and crediting the second case to Giunta's, notwithstanding the fact that the second case was not taken back by Respondent.

[23] Giunta testified, when asked what he contemplated doing about T. K. Harvin as a result of this incident, that ''we would have definitely taken the order somewhere else for sure.'' Donati testified that another supplier delivered a case of ''beautiful'' Andy Boy broccoli rabe on March 25.

> The whole bunch itself, had this been frozen, had this bunch that had been frozen would be dark green and actually have a paper thin skin on it. You could pick it up and peel the frozen piece off. But the florets would still be green.
>
> These are yellow like this completely. Completely yellow.

Kent Harvin sponsored Respondent's Exhibit 13, which is the delivering driver's trip sheet covering the March 24 pickup at Giunta's Thriftway of the first case of broccoli rabe, which was delivered the day before, March 23. He also sponsored, as here pertinent, Respondent's Exhibit 14-2 which is Respondent's computerized invoice covering, as here pertinent, the pickup of the one case of broccoli rabe on March 24. The invoice is signed by Donati. Kent Harvin also sponsored a ''Return Slip'' on Harvin letterhead naming Pinto and dated ''3/24/93'' and which indicates ''1 Broccoli Rabe Poor Quality'' (R. Exh. 15). Unlike Respondent's Exhibit 12, Respondent's Exhibit 15 does not have the signature of Dave, or anyone else from Pinto Brothers.[24] And finally Kent Harvin sponsored Respondent's Exhibit 16 which is the ''HOT SHEET'' covering the ''3–24–93'' pickup of the case of broccoli rabe at Giunta's. The condition is described thereon as ''TRASH.''

Kent Harvin testified that he had been spending a lot of time in Wilmington with Respondent's new facility and either real late Wednesday, March 24, or Thursday, March 25, he read Wednesday's ''HOT SHEET'' and ''found out that the *one* box of broccoli rabe that [Tunnell] had . . . bought on the night truck and delivered the day before was, back to Giunta's, and was bad'' (emphasis added);[25] that ''Giunta's is saying, you know, who needs to do business'';[26] that he ''didn't even ask . . . [Giunta's] to save the box. I said throw it out.'';[27] that he had asked Giunta's ''the day before to save it and let me take it back''; that actually his conversation would have been with the salesman; that to his way of thinking Tunnell ''has cancer. [He, Kent] . . . tried chemotherapy . . . [he] tried radiation, through talking to him, now it was time to get out the knife cut the cancer out, he was going, that was it''; that since drivers were not his realm of responsibility he spoke with Keith about Tunnell sometime on Thursday, March 25, down in Wilmington;[28] that it was decided that since Friday was Respondent's busiest day and Respondent needed all of its drivers and since Tunnell had already asked to have off for the weekend to attend the Reserves, it was decided not to do anything that day. Kent Harvin also testified that when he and his brother decided to fire Tunnell neither he nor his brother had any knowledge that Tunnell was interested in a union, active in a union drive, solicited cards for a union, or was in any way involved with the Union; and that Tunnell's alleged union activity did not play any part in their decision to fire Tunnell.

On cross-examination of Kent Harvin, the General Counsel introduced a number of ''HOT SHEETS'' (G.C. Exhs. 7-A through 7-CC), which show, among other things, rejection of shipments by customers.[29] Also, the General Counsel introduced General Counsel's Exhibits 8 and 9 which are driver sheets for March 22 and 23, respectively. Both show the return of cucumbers whose condition was described as ''TRASH.'' After being shown these two exhibits, Kent Harvin testified that Tunnell ''was not fired for delivery of [bad] produce to . . . customers. That's not the reason why . . . [Tunnell] was terminated''; and that he did not know of anyone else at Respondent who was terminated in March 1993 for delivering produce to customers that was rejected because of its quality.[30] On cross-examination by counsel for the Union, Kent Harvin testified that while he has a temper and was ''livid'' when he found out about the second case of broccoli rabe which was delivered to Giunta's, he was not mad when he found out his employees were joining a Union. Rather, Kent Harvin testified that he was concerned. Also, he testified that although he was in a very competitive business, he was not aware of the additional expenses that a union may or may not bring. According to Kent Harvin's testimony, the three cases of ''bad'' broccoli rabe cost a total of under $100. Kent Harvin testified that he was ''mad'' because buying ''bad'' broccoli rabe two nights in a row ''showed a total disregard for the business, the company, the customer, and his job. That's why I was livid. The fact that he just didn't give a damn.''

On redirect regarding General Counsel's Exhibits 8 and 9, Kent Harvin testified that the items described as ''TRASH,'' namely, cucumbers are not normally picked up by the night truck and the number found to be trash was relatively few. Also, Kent Harvin testified that during the over 4 years he worked with the Company he could not recall a situation where a night driver purchased poor quality items 2 days in a row. With respect to how he was informed about the Giunta's second case, Kent Harvin testified that his salesman, Doyle, told him on Thursday morning, March 25, that the second case of broccoli rabe that was sent to Giunta's was no good also; that he would have had Wednesday's

[24] Kent Harvin testified that it was the general practice for the driver who returned something to Pinto Brothers to get someone at Pinto Brothers to sign Respondent's return slip. Respondent did not call as a witness the driver who handled the March 24 night run.

[25] More specifically, Kent Harvin testified as follows:

> So sometime either real late Wednesday or Thursday morning, and I think it was Thursday when I got back into my office and read Wednesday's hot sheet. I found out that the one box of broccoli rabe that had been bought on the night truck and delivered the day before was, back to Giuntas, was bad. And I was beside myself. I am saying, ''Jesus Christ, two days in a row!'

[26] According to Kent Harvin's testimony, Guinta's Thriftway told him, after the second case of bad broccoli rabe was delivered, ''if . . . [he] couldn't get it right that . . . [he] was out the door.''

[27] Kent Harvin testified that since he had Guinta's throw out this case there would not be a return sheet or a ''HOT SHEET'' for it; and that he never discussed the three cases of bad broccoli rabe with Pinto Brothers.

[28] Kent Harvin testified that he believed that it was Thursday evening.

[29] On redirect Kent Harvin testified that while some of the involved shipments could have come originally from the Distribution Center on the night truck, most of the involved items are general bulk volume nonspecialty items which are stored in the warehouse and not picked up on the night run. Regarding two of the specialty items covered, namely, raspberries and blood oranges, Kent Harvin pointed out that the former were smashed and the latter were not dark enough for the customer; and that while they would have been picked up by the night driver, neither dealt with the quality of the fruit picked up at the Distribution Center by the night driver.

[30] G.C. Exh. 11 are Respondent's rules and regulations which were effective at the time of the Tunnell termination.

''HOT SHEET'' on Thursday morning; and that even though he was angry he did not contact his brother immediately because the drivers had already left 4 or 5 hours' earlier, Keith was in Delaware and Kent knew he was going there later in the day so he just waited until then. When asked what he told Keith,[31] Kent testified as follows:

> My opening statement would have been something to the effect, get Josh the fuck outta here. He's done. Excuse me.
>
> And then I would have gone on to explain why. And then Keith would have told me what he thought.

On recross, Kent Harvin testified as follows regarding what Keith said the evening of March 25:

> Keith first, he said, well, we don't have extra drivers, so I need him tomorrow. And, he said, he's going away for the weekend. And you know, we're, we'll be okay. We have, you know our business is lighter in the Mondays, on Mondays through the first part of the week, we don't use as many trucks. We'll be okay after that. Meaning Friday.

Keith Harvin testified that on Thursday, March 25, 1993, his brother Kent came to the Company's Wilmington facility about 5 p.m.; that Kent was ''upset and pissed off about something . . . [Tunnell] had done''; that Kent told him ''to fire the son of a bitch, Josh Tunnell. Get rid of him''; that Kent told him about the ''Giunta's incident''; that he explained that he did not have a truckdriver to take Tunnell's Friday delivery run and no one knew Tunnell's route so he needed Tunnell the next day and he, Tunnell, would be fired on Monday; and that they decided that Kent would tell Tunnell.

On Friday, March 26, 1994, Tunnell entered Respondent's office which, at that time, was located across the street from its Chester warehouse. Tunnell testified that he was standing in the office; that an unnamed secretary, Mike Anderson, who is one of Respondent's drivers, and Keith Harvin's wife, Melody, were in the office; that Anderson approached him and said, ''You know you should get your boy Alfred to sign one of them cards''; that he did not respond; and that Alfred is another one of Respondent's truckdrivers. After he turned his trip tickets and money into Melody Harvin he told her he needed a $50 advance because he had to go to National Guards that weekend, he did not have much money, and his next paycheck was not until April 1 or 2. Tunnell testified that Melody Harvin telephoned Keith Harvin; that he told Keith he needed money; and that Keith said, ''You got Guards this weekend. You and your old lady going to have a good time, right. I'll see you Monday.'' On cross-examination Tunnell testified that Melody Harvin was not in the same room as he and Anderson when Anderson made the above-described statement; that the door to Melody Harvin's office was open; that Melody Harvin was about 18 feet from him when Anderson made the statement; that Anderson said you, ''need to talk to . . . [your] boy Al, he'll go for it''; and that Anderson was speaking in a normal conversational tone. On redirect Tunnell testified that when he testified herein he did not know if Anderson mentioned the union authorization cards when he made this statement in the office. Keith Harvin testified that when his wife, Melody, telephoned him he told her to give Tunnell the $50 he requested but he did not have a telephone conversation with Tunnell that day. Anderson testified that the conversation Tunnell alleges he had with him in the office on the Friday before Tunnell was fired never occurred.[32]

On Sunday, March 28, Satchell telephoned Tunnell and told him that he had Sunday night and Monday off. Keith Harvin testified that he ''would have called . . . [Satchell] Sunday, told him to call Josh [Tunnell], and tell him he was off that night and also off that Monday.'' On Sunday, March 28, Satchell prepared a list of which driver took which route (G.C. Exh. 14). Satchell wrote ''Backup John M. [McConnell] off Joshua'' Keith Harvin testified that this meant that Tunnell was off that day.

When called at the outset of the hearing herein by counsel for the General Counsel, Keith Harvin testified that he and his brother Kent discussed terminating Tunnell and the decision, according to Keith Harvin's ''best recollection,'' was reached on March 29, the day Tunnell was terminated.[33] According to Keith Harvin's testimony, Tunnell, who was responsible for checking the product, purchased rotten broccoli rabe two nights in a row, and the rotten product was delivered to the same customer, Giunta's Thriftway, 2 days in a row. Keith Harvin explained that because of Tunnell's mistakes Respondent ran the risk of losing this account.

According to Kent Harvin's testimony, there were other prior incidents when Tunnell, as a night truckdriver, did not ''get it [product] and get it good.'' Kent Harvin testified that in late February he had a conversation with Tunnell when he bought some bananas which had to be returned because they were bad or they were not what the customer ordered;[34] that on occasion Tunnell claimed that some item was not available at the Distribution Center and when he went to the Distribution Center about 4 hours later the item was available; that this necessitated an emergency delivery, which is a service Respondent provides ''everyday'' but which is a very expensive process; and that he spoke to Tunnell about the availability situation in the middle of March. When asked on direct by Respondent's counsel why Respondent did not keep Tunnell for his day run only, Kent Harvin testified that Tunnell ''was cancer . . . an accident waiting to happen. If he had such disregard for the customer, for the company, for his job . . . it was just a matter of time before something happened on the day shift that just was a continuation of what . . . [Kent Harvin] was seeing on the night.'' Kent Harvin testified that he terminated Tunnell on Monday, March 29.

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[31] After asking Kent Harvin what he told Keith, counsel for Respondent asked, ''[I]n words to the effect of your interest of how you felt, what you wanted, or what you recommended.''

[32] When asked when he became aware that Tunnell was interested in having the Union at the Company, Anderson testified, ''I would think it would be after he was fired [because] [i]t just coincided with the fliers being put on the cars.''

[33] Keith Harvin testified that he is in charge of hiring people, and that he generally oversees the Company as far as the workforce, accounting department, and truck maintenance is concerned.

[34] R. Exhs. 7 and 8. The ''NITE TRUCK MARKET LIST'' pick-up sheet introduced herein and the returned merchandise sheet of the vendor are both dated February 28.

On Monday night, March 29, Kent Harvin telephoned Tunnell and said, according to Tunnell's testimony, that he was being terminated for buying bad produce. More specifically, Tunnell testified that Kent Harvin said, ''Josh, me and Keith is not satisfied with the way you're buying produce at night. We're going to just go ahead and let you go.''[35]

On Tuesday, March 30, Tunnell telephoned Keith Harvin and asked why he was fired from the day job also since it did not have anything to do with the night job.[36] Keith Harvin told Tunnell to bring in his uniform and get his paycheck.

With respect to what it was charged by Pinto Brothers regarding the three involved cases of broccoli rabe, Kent Harvin gave the following testimony:

> JUDGE WEST: What kind of an account do you have with Pinto? Is it a cash and carry or a charge?
>
> THE WITNESS: Charge. All by business is charge—
>
> JUDGE WEST: Are you billed monthly?
>
> THE WITNESS: No sir, weekly.
>
> JUDGE WEST: Weekly?
>
> THE WITNESS: Yes sir.
>
> . . . .
>
> JUDGE WEST: With respect to the third case that was picked up, it was actually an individual case picked up, according to the record, on the 23rd of March?
>
> THE WITNESS: I think that's correct.
>
> JUDGE WEST: [There is [t]estimony . . . [b]y you and at least one other witness, that that case was destroyed?
>
> THE WITNESS: You mean by that burned in the trash?
>
> JUDGE WEST: Right.
>
> THE WITNESS: Yes sir.
>
> JUDGE WEST: Since it wasn't returned, it would follow logically that Pinto billed you for that third case, and you paid for that third case, is that correct?
>
> THE WITNESS: Yes and no. Logically, it would fall that way. And an exception to that would be that, you know, for the most part, in our business, there is no secrets. Everybody knows what they're selling, and I had the relationship, I had the relationship with just about all the merchants down on the market that they we're a very honorably company, we try to buy good stuff.
>
> And you know, *if I were to call and say*, hey, you know, I got some bad broccoli rabe, or I got some bad peppers, what I told them, you know. *I wouldn't necessarily have to pay for it.* If they knew that what I was telling them was the truth. Meaning that they had other complaints, or something of that nature.
>
> But the normal, because I didn't have paper work to support that return, would indicate that you know, a week or two later, when a clerical person was doing the bill, because there wasn't paper work to support a return, then the procedure would be to pay the bill.
>
> JUDGE WEST: So you think that's what happened here, you paid the bill for that third case?
>
> THE WITNESS: I happen to know that I paid for two out of the three.
>
> JUDGE WEST: So you didn't pay for the third case?
>
> THE WITNESS: No sir. Well, I paid for two out of the three.
>
> JUDGE WEST: You paid for two out of the three?
>
> THE WITNESS: Yes sir.
>
> JUDGE WEST: And you returned two out of the three.
>
> THE WITNESS: Correct.
>
> JUDGE WEST: So you weren't given credit for both of the cases that were returned?
>
> THE WITNESS: No sir. I didn't take credit. I was given credit, I didn't take it. It was, what it worked out to be is a clerical error a couple of weeks down the road when the bill went to get paid. There was an error. And one of the two cases of broccoli rabe, to the best of my knowledge, were paid for in error.
>
> JUDGE WEST: Okay. So you paid for two out of the three, and it was an error. Was that error ever straightened out?
>
> THE WITNESS: I didn't find out about it until very recently. By *re-looking* at some of the documents
>
> JUDGE WEST: Has anyone contacted Pinto to point that out, that it was an error?
>
> THE WITNESS: I haven't yet, no sir.
>
> JUDGE WEST: Anything else?
>
> MR. CABOT: No.
>
> MR. WAINSTEIN: Nothing, Your Honor.

After the lunch break Kent Harvin gave the following testimony:

> MR. CABOT: Your Honor, I'd like to have Mr. Keith, Kent Harvin to return to the stand to ask him one or two questions, just for the point of clarification of the record in response to I think the last or the next to the last question that you asked.
>
> JUDGE WEST: Any objection?
>
> MR. WAINSTEIN: No objection.

Whereupon, Timothy Harvin was recalled as a witness, and having been previously duly sworn, continued to testify on oath as follows:

> JUDGE WEST: You're still under oath, sir.
>
> (Further redirect examination)
>
> Q. (By Mr. Cabot): Mr. Harvin, I think you testified that you were the president of T. K. Harvin?
>
> A. Yes sir.
>
> Q. And that you were the president of T. K. Harvin during 1993?
>
> A. Yes sir.
>
> Q. And you were the president just to be very clear and specific during March of 1993.

[35] Tunnell testified that he had never received a written warning during his employment with Respondent. On cross-examination Tunnell testified that in November 1992 Kent Harvin ''hollered'' at him about some raspberries but it turned out that he was not the responsible party; that no one ever told him that on February 28 he picked up three cases of allegedly faulty bananas which had to be returned; and that he was not aware that on March 10 he picked up four cases of allegedly faulty french beans (haricots vert). Tunnell testified that T. K. Harvin had haricots vert in its warehouse and ''he changes and sent back the following . . . night to make the difference.'' On redirect Tunnell testified that no one reprimanded him for allegedly picking faulty bananas on February 28 or faulty beans on March 10.

[36] Tunnell testified that he was never told by anyone in management that he had a problem with how he did his day run.

A. Yes sir.

Q. During your, during the period in question, March of 1993, let's take during your entire tenure as president of T. K. Harvin. Is one of your responsibilities to check bills and invoices before they go out to customers?

A. No sir.

Q. Is that a responsibility of your brother, Keith Harvin?

A. No sir.

Q. When was the first time that you discovered that there were two boxes of broccoli rabe that we've been talking about during this hearing, for which you did not receive credit?

A. This week. Earlier this week.

Q. You haven't, as I understand your testimony received credit yet for the two crates of broccoli rabe?

A. Have not received credit for two.

Q. Isn't it important for you to get, or seek, or obtain credit for that, for those two boxes of broccoli rabe?

A. Yes sir. Yeah, we're, yes sir, it's, it is important. But it's certainly not the most important issue. It's a total of $32. $16 times the two crates.

But really what was at issue here was my reputation, you know, as being a good shipper of good stuff to good places, was being destroyed. At least in Giunta's eyes. And you know, that's the real issue here is why I was so upset and things, and Josh got terminated.

It was because of, you know, the damage that could be done. I could lose a customer. Giunta's' approximately a thousand, a hundred thousand dollars a year, customer to us. And you know, the fact that we couldn't get something right two days in a row was just unforgivable.

MR. CABOT: No further questions.

JUDGE WEST: Anything else?

MR. WAINSTEIN: No. [Emphasis added.]

Keith Harvin testified that it is not his responsibility to review bills and invoices and the first time he discovered that T. K. Harvin did not get a credit for one of the involved cases of broccoli rabe was the week he first testified herein.

The bills and credits of Pinto Brothers, Inc. to ''5K's Farm Market''[37] for the week ending March 25, 1993, were received herein as General Counsel's Exhibits 13(a), (b), and (c). As listed on General Counsel's Exhibit 13(a) for the date March 23 there is an entry for two Rappini, which is broccoli rabe, for the date March 24 there is an entry for one Rappini; and for the date March 25 there is an entry for three Rappini. General Counsel's Exhibit 13(c) for March 23 lists a credit for ''1 broccoli rabe.'' Keith Harvin testified that the three above described cases of Rappini with a date of March 25 were bought by his brother Kent probably for the weekend since the market is closed on Saturdays and Sundays and Kent was probably buying it for Saturday deliveries; and that there are some situations where Respondent purchases broccoli rabe where it is not on special order because Respondent has Italian restaurant customers that order on Saturdays and the Distribution Center is closed so Respondent has to anticipate the customer's needs. Kent Harvin testified regarding Pinto's bill for the week ending March 25 (G.C. Exh. 13(a)) and, as here pertinent, the credit (G.C. Exh. 13(c)), that the rappini listed for ''3/23'' was actually purchased the night of March 22 because anything bought after the day people leave, namely, night purchases, is billed on the next day; that he purchased the three cases listed on the bill for ''3/25'' ''because . . . [he] already had orders for it''; that he would not have purchased broccoli rabe on March 25 if he did not have a special order for it; and that perhaps the reason the credit from Pinto, General Counsel's Exhibit 13(c), is dated ''3/23'' is that T. K. Harvin's return slip (R. Exh. 12), a copy of which was left with Pinto, is dated March 23, the night when Tunnell returned the case of broccoli rabe which was rejected by Hercules Country Club.

According to the testimony of Keith Harvin, driver Warner was terminated at the end of March 1993 because he was suspected of stealing a pocketbook from Giunta's Thriftway and he ran out of gas while making deliveries and consequently made his deliveries late causing one customer to telephone Respondent.[38] Keith Harvin testified that Miller, was terminated in the beginning of April 1993 when one of Respondent's customers accused Miller of urinating at its establishment. Also, Keith Harvin testified that in March 1993 other than Tunnell, no other employee was disciplined for reasons relating to the delivery of bad produce to customers.

Sometime around April 2 (8 to 10 days after Donovan gave the union authorization cards to Tunnell) Donovan met Walker at McDade Mall and Walker gave Donovan a number of signed authorization cards.[39]

According to Donovan's testimony, on a Sunday sometime in early April a formal union meeting was held at the Longshoremen's hall in Wilmington. Kuhn, among others, attended. This was the only union meeting held during the campaign.

Kuhn, who was hired by Respondent in January 1993 as a truckdriver, testified that in the end of March or the beginning of April 1993 Keith Harvin said, after Kuhn was finished work that day, ''Hey, Frank, its about time you come in, we talk about a raise'' and Kuhn said, ''I'll get with you''; that he was in a hurry that day and a couple of days later he spoke with Keith Harvin in his office; that Keith Harvin during this meeting, with just the two of them present, asked him how he was doing and if he had any complaints; that the meeting occurred between a week and a week-and-one-half after Tunnell was fired; that he asked Keith Harvin if he had a full-time dispatcher and he said he did not; that he told Keith Harvin that he wanted to work

[37] According to Keith Harvin's testimony, this was the name of the retail operation which switched to wholesale in 1984.

[38] Keith Harvin testified that G.C. Exhs. 12(a), (b), and (c) is a list of employees terminated by Respondent during a specified period; that the list was prepared in response to a subpoena Respondent received for the hearing herein; and that with one exception not here relevant, he wrote in the reason for the terminations. The list gives the same date of termination, March 28, 1993, for Tunnell, Warner, and Walker. The reason for the terminations of Tunnell and Warner are the same, namely, ''Laid off (Fired).'' The reason specified for Walker's termination is ''Laid off.'' Only the word ''fired'' appears after driver Ray Miller's name.

[39] It was indicated by counsel for the General Counsel at the hearing herein that, with respect to the dates on the authorization cards, 1 was signed on March 24, 11, including Tunnell's, were signed on March 25, and 4 were signed on March 26. Another card was signed on May 11. While counsel for the General Counsel indicated that Walker signed a card, the card apparently had been mislaid.

for Respondent as a full-time dispatcher for $70 a day[40]; that Keith Harvin asked him if he heard anything about the Union and he replied, ''[Y]es''; that Keith Harvin asked him how he felt about the union and he told Harvin that he wanted to continue to work for Respondent, he came to work for Respondent without a Union and as long as he could make a ''decent dollar'' he was not in favor of the Union; that Keith Harvin asked him what were the drivers' concerns and what was the largest problem they have; that he told Keith Harvin that two of the drivers' biggest concerns are money and the way they are treated; that Keith Harvin said, ''[W]ell, if we can keep the union out of here, I could probably hit your number''; that he then asked Keith Harvin if he would like him to get the drivers together to find out what the concerns are; and that Keith Harvin said it was okay for him to put up a flyer by the timeclock to advise all drivers that they were going to have a meeting. On cross-examination Kuhn testified that he never asked Keith Harvin for money; that he did not in March or April 1993 tell Respondent's employee Anderson that he was going to go to Keith Harvin and ''shake him down'' and ask him for $5000; that his conversation with Keith Harvin about the dispatcher's job listed about 2-1/2 hours; that he volunteered to arrange the drivers meeting and find out the drivers' concerns and he said to Keith ''we'll discuss them''; and that the conversation when he told Keith Harvin that he would ''get back with you'' occurred probably a day or two after Tunnell was fired. Kuhn testified on cross-examination that the drivers did meet and they voted him to be their spokesperson; that he told Keith Harvin that the drivers had voted him to be their spokesperson; that a couple of days after the drivers' meeting Keith Harvin sought him out and asked him how the meeting went; that he told Keith Harvin what the drivers' concerns were; that this conversation with Keith Harvin lasted one-half hour; and that they discussed drivers' concerns, namely, pay, job security, back braces, and treatment.

Keith Harvin testified that Kuhn came to him and asked for a raise and he told Kuhn that he was constantly late for work and he could not do anything about a raise but he would get back to him. While Keith Harvin conceded that he had a conversation with Kuhn about a dispatcher's job, Keith Harvin asserted that he never had a conversation with Kuhn between March and the election which lasted 2-1/2 hours. Regarding this conversation, Keith Harvin testified that when Kuhn asked about a dispatcher's job he told him when he thought it was a good business decision he would entertain the idea; and that he did not discuss Kahn making $70 a day. Keith Harvin testified that Kuhn approached him on a regular basis, telling him what the feelings were among the drivers and giving him the impression that he was close to the drivers; that he never asked Kuhn how the union problems came about; that Kuhn never told him who was involved in the union drive and he had no knowledge which employees were for the Union; that Kuhn told him that Kuhn could live with the Union or without it; that Kuhn told him that drivers were concerned about paying for their uniforms, better hand trucks, lockers, and money; that he did not recall Kuhn saying that the drivers were concerned about job security or about fair treatment; that he did not tell Kuhn that if he kept the Union out Keith Harvin could ''hit . . . [Kuhn's] number''; that Kuhn did say that he would get the drivers together to have a meeting; that Keith Harvin did not ask Kuhn to have the drivers meet; and that he told Kuhn that he could not promise him anything regarding what the drivers indicated they wanted because that was illegal.

According to the testimony of Kuhn, a day or two after discussing a dispatcher's job with Keith Harvin, he had just finished making his deliveries and when he returned to Respondent's warehouse he asked Keith Harvin why Tunnell was fired. Kuhn testified that Keith Harvin had no response at first; that he then said, ''Come on, why was he fired''; and that when he explained to Keith Harvin that people were concerned about the firings Keith Harvin said, ''Off the record, he was fired because he brought the Union here.'' On cross-examination, Kuhn testified that his relationship with Keith Harvin was such that Keith offered him and his wife baseball tickets and Keith offered to let him charge flowers to Keith which Kuhn was going to sell at Easter and/or Mother's Day. Kuhn also testified that he first told counsel for the General Counsel about this conversation 1 week before the hearing herein began.[41] Additionally Kuhn testified on cross-examination that he asked about Tunnell's termination because he was driving Tunnell's route and he liked it. Keith Harvin testified that it would be ludicrous for him to tell Kuhn that Tunnell was fired because he brought in the Union; that at the time of this alleged conversation Kuhn had only worked for Respondent for about 2 months; that he did not like Kuhn that much; that he never told Kuhn that Tunnell was fired because he brought in the Union; and that he did not fire Tunnell because he brought in the Union.

On April 6 a petition for an election was filed by the Union. Keith Harvin gave the following testimony regarding what occurred after the petition was filed:

> A. . . . When we were petitioned April 6th, I had several different companies approach our company to try to give some advice. So we sat down and talked to probably three or four different companies that were not attorneys.
>
> Q. Consulting companies?
>
> A. Consulting companies on how to keep the Union out. And they gave me a lot of information on the things I could do, legally, and couldn't do legally.
>
> Q. Do you recall some of the things they told you, what you could do or what you couldn't do?
>
> A. I could, I wasn't allowed, it was illegal to ask someone whether they were for the Union or against the Union. It was unlawful for me to approach anyone about their concerns. Whether they were, you know, what beef they had. It was illegal to give anybody raises or anything like that, to try and sway their vote. That was probably some of the illegalities that I learned along the way.
>
> Q. Were you told whether or not you could fire somebody because of the Union activities?
>
> A. No, I couldn't, they told me I couldn't fire nobody. For Union activity. That was against the law.

[40] At the time Kuhn's pay was $45 a day.

[41] Kuhn also testified that he discussed this conversation with counsel for the General Counsel the week before that. Subsequently, however, Kuhn testified that this subject was not discussed with counsel for the General Counsel at both of these meetings.

Q. Did they discuss anything with you about making promises to employees, other than wage increases?

A. Yes, they did. I couldn't do that, either. I couldn't promise anything. I couldn't promise anything. Take it under advisement, but I couldn't promise anything.

You know, if a driver approached me and said, hey, what are you going to do about the uniforms? You know, I said, I'm not going to promise you anything.

When Respondent opened its new facility in Wilmington in the second or third week in May it had an open house for its employees and their families. Keith Harvin testified that only Kuhn brought beer to the party; that alcoholic beverages were not supplied at the party; and that Kuhn was intoxicated.

The parties stipulated that on or about June 1 Respondent posted or disseminated three documents, General Counsel's Exhibits 4, 5, and 6 at its facility for the employees to see. The documents show that the Respondent was opposed to the Union during the campaign. Counsel for the General Counsel indicated that they were introduced to show antiunion animus. Copies are attached hereto as Appendices A [G.C. Exh. 4], B [G.C. Exh. 5], and C [G.C. Exh. 6], respectively.

Kuhn testified that he attended one union meeting during the campaign; that the meeting occurred approximately 1 week before the June 11 vote for or against the Union and the meeting was held at the Longshoreman's union hall in Wilmington; that the next day, a Monday, Keith Harvin asked him how the union meeting went; that just he and Keith were present in the latter's office during this conversation;[42] that he told Keith Harvin that ''it shouldn't be too hard to find out, that, as . . . [he] understood it, he [Keith Harvin] paid Jack Gehling [one of Respondent's employees] to go and tell all that went on at the meeting, who asked what questions, everything''; that Keith Harvin then said, ''Whether I paid him or not, that's my business. I can do as I like''; and that Keith Harvin asked him his opinion of how he thought the election would go and he told Keith Harvin that Respondent was going to lose. Keith Harvin testified that Kuhn came to him and told him that the Union was going to have a meeting; that he did not ask Kuhn anything about the union meeting; that Kuhn came to him after the meeting and said it was no real big deal and there were about 10 people there; that Kuhn did not tell him the names of the people; and that he was not positive that he had a conversation with Kuhn about Gehling. With respect to Gehling, Keith Harvin testified that Gehling approached him and said that he was going to the meeting; that Gehling approached him after the union meeting and told him more or less the same thing Kuhn told him; that he did not pay Gehling to go to the union meeting; and that he did not tell Kuhn that even if Keith Harvin paid Gehling, he could spend his money any way he wanted. Keith Harvin also testified that he never asked Kuhn how the election vote was going to go; and that Kuhn did tell him that the drivers were going to support the Company in the election.

On Wednesday, June 9, according to the testimony of Keith Harvin, Kuhn told Keith that he could guarantee the Company would win the election and keep the Union out. Keith Harvin testified that Kuhn said that he wanted Keith Harvin to give him $5000 to spread out among the drivers; that he told Kuhn that would be illegal and Keith Harvin believed that he could go to jail for that; that he told Kuhn that he did not need to win that bad; that the conversation lasted about 3 minutes; that he told his brother about this conversation later that day; and that he called his attorney about the conversation. With respect to his telephone call to his attorney, Keith Harvin testified as follows: ''My best recollection it was Friday of the election. It was too late in the day Thursday to get a hold of my attorney. This was four, five, 6:00 o'clock.'' Subsequently, Keith Harvin testified that he ''tried to get a hold of [Respondent's attorney Cabot] Thursday—. . . . [l]ate in the day Thursday.''

Anderson testified that on June 9 or 10 Kuhn approached him about 5 a.m. and said he, Kuhn, was going to ask Harvin for $5000 to buy no-votes so the Union would not come in; that ''it was to be contingent on everybody would have to be paid at the end of the day, had the Union—if they lost the election'';[43] that the drivers would get $500 a piece; and that there were 10 drivers.

Regarding the election, Borrelli testified that on June 11 she voted at the Chester facility, at about 8:15 a.m., on her way to work at the Wilmington facility; that union observer Tunnell challenged her vote and her ballot was sealed in an envelope; that she was about 3 feet from the Board agent when he took the ballot box off the floor, placed it on a table, and counted the ballots; that she noticed that two of the ballots had been folded together; that the Board agent ''had to take both of his hands to sort them''; that she said, ''Wait a minute. They are folded together exactly the same way; they're almost stuck together''; that the Board agent ''turned to me and said—he looked at me, acknowledged that there was a problem, and said, 'Well, the vote is yes. Isn't that what you wanted'''; that she said, ''That's beside the point. That's not the issue; the issue is that they were folded the same way''; that the Board agent set the ballots down on the table and moved on to the next one in the box;

[42] Later Kuhn testified that the conversation started outside in the warehouse and they walked into the office.

[43] More specifically, Anderson testified as follows:

Q. Okay. And could you tell Judge West what happened?

A. Well, Frank approached me about five o'clock in the morning, and he mentioned something about he was going to ask Keith Harvin for a substantial amount of money, I think it was, like, $5,000, to by some no-votes so the Union wouldn't come in. It was to be contingent on everybody would have been paid at the end of the day, had the Union—if they lost the election.

If the Union lost the election, everybody got paid at the end of the day. And I thought it was kind of absurd what he said it. I didn't pay much attention to it. That's about it. It wasn't much of a conversation, just—

Q. Why did you think that was ''absurd,'' to use your word?

A. Well, *to be as honest as I can*, I can't even imagine Keith Harvin, I mean, even listen, I'll do something like that. Now, I've known him ten years, and it just seemed utterly ridiculous.

Q. Okay. Now you said that everyone would get a *big paycheck*, according to Mr. Kuhn. Right? When were you scheduled to be paid?

A. Well, that Friday was a pay day, and it just happened to be the election day; so I guess he figured why don't they get paid, plus they get $500 a piece, and it would have swayed them to a no-vote. That was his reasoning, I suppose. [Emphasis added.]

As noted above, Anderson, before being asked by counsel for Respondent, did not testify about a ''big paycheck.''

that company observer Dennis Smith spoke up and said he saw the same thing; that the Board agent counted the number of ballots against the number of check marks the observers placed on a list of these eligible to vote; that the Board agent said he ''found empty ballots on the floor or laying in the poll''; and that she told the Board agent that she was concerned that someone had voted twice. On cross-examination, Borrelli testified that she could not recall Smith's exact words; that the Board agent said he found empty ballots on the floor in the room that they were voting in and the ballots did not have any mark on them; and that she took his statement to mean ''this election, the election he was in, that he had found empty ballots on the floor at this election at the time.''

Smith testified that the election was held at Respondent's Wilmington and Chester facilities; that the first was held at Wilmington and the Board agent, before the voting, told him and the other observer, Tunnell, that, as here pertinent, they were not allowed to speak to any of the voters outside of a greeting; that at the Chester facility Tunnell told someone ''in the door getting ready to vote to go and get someone [a named individual] to vote''; that he objected to the Board agent regarding Tunnell's statement and the Board agent told the individual who Tunnell spoke to disregard what Tunnell said; that a couple of minutes later the named employees showed up; that also at the Chester facility when the Board agent was counting the ballots after the voting, two of the ballots were folded together one inside of the other; that he, along with Borrelli, objected to the Board agent about the ballots; and that the Board agent counted the ballots and reviewed the list of eligible voters which Tunnell and Smith would check off as an employee came into the polling place to vote, and he determined that was no discrepancy between the number of voters and the ballots cast. On cross-examination Smith testified that the number of names with check marks next to them was exactly equal to the number of counted ballots plus the number of challenged ballots. On redirect, Smith testified that the Board agent indicated that he found empty ballots in the polling booth on more than one occasion with respect to the T. K. Harvin election. On recross Smith testified that no voter came to vote twice and that he did not see Protas give any voter two ballots. Subsequently Smith testified that the Board agent said regarding the two ballots that one ballot must have fallen on top of the other; that as he looked at the two ballots in question the Board agent indicated which way the ballots were cast but Smith could not remember which way they went; and that as far as he could remember the Board agent only said whether the two ballots were ''yes'' or ''no'' votes.

Keith Harvin testified that, among others, six named individuals who were employed by Respondent at the time were present for the counting of the ballots at Chester; that he did not tell the employees, excluding Smith, who was an observer, ''to stay around and watch the counting of the ballots''; and that he did not tell any of the five employees that they should be a spokesperson on behalf of Respondent.

Henry Protas, who has been a Board staff attorney and run representation elections for 18 years, testified that he ran the election involved herein; that it was held at two sites, Wilmington and then Chester; that with the challenged voters he took all the relevant information to fill out the envelope stub in which the challenged ballot was placed, namely, among other things, the voter's name and the reason for the challenge; that as he has done in the past, he took the ballots and folded each one once in half before he gave it to the voter; that he did this because he noticed over the years that if he did not fold it, the voters would fold the ballot themselves and sometimes they had problems getting the ballot in the slot on the ballot box; that also when the voter folded the ballot into a tiny piece of paper he had to unfold the many folds when he counted the ballot; that he is positive that he gave only one ballot to each voter;[44] that when the voter entered the polling room he or she would give their name to the observers to check off his or her name on the eligibility list; that he then gave the ballot to the voter; that he watched the voters as they placed their ballots in the box; that he gave a copy of the Board's instructions to the election observers (G.C. Exh. 18);[45] that in addition to the printed instructions he told Smith and Tunnell that they were not to engage in campaigning and they were to help in the smooth running of the election; that Tunnell, at the Chester site, spoke to a voter on his way out after voting, asking the individual if another named employee was there that day and then telling the individual that the other employee ''hasn't voted yet''; that he told Tunnell ''not to do that, that was none of his business whether somebody voted. Campaigning was over and he shouldn't do that''; that as he counted the cast ballots in Chester he showed them to those present; that before he did this he took out the challenged ballots, which were in envelopes, he went through them one-by-one restating the name of the voter, the reason for the challenge to the voter and tried to see if any of the parties wanted to change their position as the voter's eligibility; that as he subsequently counted the unchallenged ballots he took the ballots out of the box and placed them in a ''yes'' pile or a ''no'' pile; that at one point he stuck his hand into the ballot box and pulled out two ballots with ''[o]ne ballot. . . . stacked inside the other ballot''; that regarding these two ballots, [o]ne was on top of the other. . . . they were stacked on top of each other''; that these two ballots were both ''yes'' votes; that the woman who had been challenged earlier, Keith Harvin's sister, said that she felt that these two ballots were cast by the same individual; that he explained to her that he folded each of the ballots the same way before he gave it to the voter and

> what often happens is that one person cast[s] [a] . . . ballot . . . puts it in the box, [it] stands straight up, and the second person comes in behind them and casts a ballot and then it slips right inside the other one, or right outside the other one;

that he told Borrelli that he would count the number of voters who cast ballots by looking at the eligibility list; that he told Borrelli

> the one thing that is outside of the Board Agent's complete control is if someone was to take a ballot and then not cast it.

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[44] He pointed out that this was demonstrated by the fact that when it became an issue he checked the number of people who cast ballots against the number of ballots that were counted and found that they were equal.

[45] One of the listed ''THINGS NOT TO DO'' is ''[e]lectioneer any place during the hours of the election.''

> And I said, you know there's some remote possibility that there might be less ballots in the box than there are eligible voters, but there is no way that we are going to find that there are more ballots in there than there were voters;

that he counted the votes and filled out the Board's tally of ballots and gave the parties copies of the certification of conduct of election; that as he was doing his above-described paperwork Keith Harvin's sister, Borrelli, insisted that something was not right about the fact that these two ballots ''were one inside of each other''; that after he finished his paperwork he compared the number of ballots that were cast to the number of people on the eligibility list who had cast ballots and they were the same; and that Keith Harvin's sister, Borrelli, again said that she still thought something was not right about the placement of these two ballots in the box. On cross-examination Protas testified that Smith did not raise a question about the two ballots together; that he did not recall Smith saying anything on any subject once the ballot count began; that after he compared the eligibility list to the number of ballots cast and as Keith Harvin's sister, Borrelli, continued to insist that there was something wrong, Keith Harvin, who was present at the counting of ballots in Chester, said, ''Don't worry about it, don't worry about it. This means we have a delay. We've won. It doesn't matter. Forget about it''; that he was not aware that Smith provided an affidavit to the Board indicating that he protested to Protas the question of the two ballots; that regarding the voting which took place at Chester, he was not sure of the location of the ballot box in the room but he believed it was closer to him than to the doorway voters used to enter the room;[46] that be believed that the box was not on the floor but he is not sure; that he was not sure if he was sitting at the same table as the observers; that as many as four voters could have been in line waiting to vote, in the voting room; that the voters lined up in the doorway to the room but there would not be as many to four voters at once in the room where he and the observers sat; that he did not believe that some of the voters waiting to vote were within a foot or two of the voting box; that when Tunnell wanted a voter to go out and get another employee to come in and vote Protas told Tunnell ''[n]o that's none of your business. You're serving as an observer now, and it's none of your business as to whether or not the person chooses to vote''; that he was concerned that Tunnell's conduct bordered on electioneering; and that he could not recall the name Tunnell mentioned; that he believed he told Tunnell ''[t]he campaign is over. While the election is on, you're here to help me out in conducting the election''; and that in his mind it was implicit that Tunnell was interested in having the voter come in to vote partisan reasons. Subsequently, Protas testified that Smith did not say anything about Tunnell's conduct in this regard; that he did not tell the voter to whom Tunnell was speaking to disregard Tunnell's remarks; that he did not, with respect to the situation involving one ballot folded inside another, tell Borrelli's ''[i]sn't that what you wanted? yes votes?''; that he did not know if he told Borrelli if he found empty ballots on the floor or in the voting poll or booth; and that he told Borrelli that he ''heard from other people that there had been stories of a Board Agent finding a ballot stuck inside the booth, or something'' but that did not occur at the T. K. Harvin election.

On July 1 Kuhn filed a charge with the Board in Case 4–CA–21842 against T. K. Harvin & Sons, Inc., alleging Respondent violated Section 8(a)(1) and (3) of the Act (G.C. Exh. 1(n)), in that

> Sometime in late March or early April 1993, the above named employer conditioned my raise on my being able to keep Teamsters Local 929 out of the company. On or about June 12, 1993 the above named employer threatened to fire me if I did not work on Saturday (June 12, 1993). The employer has taken the above actions against me because of my union activities.

As indicated in Respondent's Exhibit 6, Region 4 of the Board found that there was

> insufficient evidence to establish that the Employer violated Section 8(a)(3) of the Act, as alleged, or violated Section 8(a)(1) of the Act by threatening to terminate. . . . [Kuhn] because of . . . [his] Union activities.

On July 12 Kuhn gave an affidavit to the Board (R. Exh. 5). In it he describes conversations he allegedly had with Keith Harvin on or about June 6 and in mid-April 1993. The former assertedly involved a conversation about a union meeting and the latter involved a conversation about a dispatcher's position. Also included in the affidavit is an alleged conversation between Kuhn and Keith Harvin on June 11 after the election and a description of what allegedly occurred when Kuhn requested a day off on June 12. Kuhn testified that he told the Board agent who took the affidavit about the conversation involving Tunnell being fired because of the Union but the Board agent ''said to me I have to stick to the points that just had relevance to me as an individual.''[47]

With respect to Kathy Borrelli, Walker testified that she worked in the warehouse office as an order taker; that while the drivers and warehousemen wore uniforms, Borrelli did not; that he was not aware of Borrelli punching a timeclock; and that Thomas Harvin formerly owned the Company and Borrelli is his daughter. On cross-examination Walker testified that wearing a uniform was voluntary. He also testified that in January, February, and March 1993 when Keith and Kent spent most of their time in Wilmington, Delaware, getting that facility ready for operation,

> [t]he only one in there [at the Chester facility] who I had to answer to was Kathy Borrelli, not indirect. I would have to go to her and say things to get a hold of Keith, because I need Keith's advice, and she would tell me other things to do, or what would you think Keith would do.

[46] See ALJ Exh. 1. Protas testified that he and the observers could see the ballot box at all times and there was no one standing between him and the box or the observers and the box.

[47] On April 6 the Union filed a charge against T. K. Harvin & Sons, Inc. in Case 4–CA–21599, G.C. Exh. 1(c), alleging that ''On or about March 29, 1993 the Employer discharged Joshua O. Tunnell for discriminatory reasons because of his support for the Union.''

Additionally, Walker testified that when Keith and Kent were in Wilmington, if a warehouse employee had to leave work early they would speak to him or Borrelli; that when there was little to do Borrelli picked and sorted tomatoes; that this involved maybe 30 to 40 percent of her time; that Borrelli did not on a regular basis sort and pack tomatoes and deliver them in her car to a customer; and that he observed Borrelli between 60 and 70 percent of the time she was at work. Walker also testified that maybe once a week Borrelli would pick tomatoes; and that Keith and Kent occasionally picked tomatoes. On further cross-examination Walker testified that he spent most of his time going from one cooler to another at the opposite ends of the warehouse and the office is in between both coolers;[48] and that when he was in the freezer (10 or 15 percent of the day) and in the coolers (20 to 30 percent) (of the day) he could not see Borrelli.

Anderson testified that he ''somewhat'' had the opportunity to observe Borrelli's job responsibilities prior to the election; that Borrelli worked in the warehouse doing different jobs like sorting tomatoes; that he did not see Borrelli sort tomatoes every day; and that he did not know if Borrelli performed any other warehouse jobs. On cross-examination, Anderson testified that he spends most of his time out on the road driving a truck.

Borrelli testified that she started working for T. K. Harvin and Sons, Incorporated in January 1991; that she is ''known as 'Kathy' to all my employees and family''; that when she started in January 1991 she was a warehouse worker, sorting tomatoes and other vegetables, making emergency deliveries in her own automobile, and on occasion she would take an order; that up through 1993 she would sort 6 to 7 hours of an 8-hour day; that at times she had ''a, one of my employee [sic] by the name of Tyrone Oakley'' doing the sorting; that four or five times a week she would make emergency deliveries, which deliveries would take 1.5 to 2 hours to make; that in early 1993 she would spend 30 minutes to 1 hour a day relaying customer orders; that other warehouse people, Smith and Walker, took orders from customers and made deliveries in their own vehicles; that she was not reimbursed for her expenses when she made emergency deliveries in her own vehicle; that when she started in 1991 Keith Harvin and Walker were her supervisors; that Keith told her to check with Walker about her problems and concerns before coming to him; that in 1991 and in 1993 she was paid $66 a day; that she does not own any stock in T. K. Harvin; that she did not have any discussions with her brothers Kent and Keith regarding the management of Respondent, any business decision concerning Respondent or whether to move to Wilmington; that she had no involvement in obtaining funding for Respondent's Wilmington facility; that she is not involved in the discipline of any other warehouse employee; that she does not live with Kent, Keith, or her parents; that she does not receive bonuses or funding that other warehouse people do not get; that she does not have a pension; that her health insurance and vacation are no different than the other people who work in the warehouse; that she has never had keys to either of Respondent's facilities; that she recorded her time in a logbook in the office accross from the Chester warehouse facility; that she stopped recording her time when Respondent moved to Wilmington; that at that time she became ''the Warehouse manager—the Office—actually, excuse me—the Office Manager in Customer Service''; that her additional responsibilities included routing the emergency truck, making an employee schedule for the day, taking any calls that pertained to any driver, shortages on the trucks, or dealt with customer service quality; that once she was given that title she was told she no longer had to record her time; that this occurred 6 or 7 months before she testified herein on March 7, 1994; that she does not wear a uniform, which is not mandatory; and that there is a uniform charge. Borrelli also testified that Respondent has a policy that if an employee is going to be late coming to work, he or she is supposed to call into Respondent the night before, if possible; that when she violated this policy she was verbally warned by her brother Kent that if she was late again she would be suspended; that subsequently she was late for work because she had to bring her daughter's glasses to school and she did not call in; that her brother Kent told her ''no matter what, under any circumstances, that if [she] . . . didn't call, the next time [she] . . . would definitely be suspended''; and that she was not late since that time without calling in. On cross-examination Borrelli testified that she is divorced and her ex-husband's name is Borrelli; that her birth name is Harvin; that she did not testify that Oakley was one of ''my employees'' but rather ''one of my fellow workers''; that she was not aware of any other warehouse employee who signed in a log book; that Keith and Kent Harvin are her brothers and T. K. or Thomas Harvin is her father; that the Company was called Five K's and in fact it is still known in the industry as Five K's; that she along with Kent, Keith, an older sister, and an older brother are the Five K's; and that Kent and Keith help out in the warehouse and sometimes make deliveries. On redirect Borrelli testified that T. K. Harvin traded under the name Five K's at the time she testified at the hearing herein; that she has no financial interest in T. K. Harvin; and that she does not get any support from her father T. K. Harvin.

Smith, who was hired by Respondent in February 1993 to work in the warehouse in Chester,[49] testified that to his knowledge Borrelli, at the Chester facility, sorted tomatoes and made emergency deliveries; that he could not see the tomato sorters from his work station; that three or four times a day he was in the area of the tomato sorters and he would see Borrelli there ''just every time''; that occasionally he did tomato sorting himself; that he believed Borrelli sorted tomatoes about 75 percent of the workday; that in the first 3 months of 1993 no one other than Borrelli was sorting tomatoes on a regular basis; and that he made emergency deliveries and spent anywhere from 45 minutes to all day doing this task.

Keith Harvin testified that T. K. Harvin is his father Thomas; that when his father is not in Florida he works 10 hours a week at Respondent; that, more specifically Thomas Harvin

> come[s] in and ruffle a little bit of feathers, making sure me and my brother are on our toes, making sure—

[48] The warehouse in Chester has a large glass window so that people in the office can look out into the warehouse and vice versa.

[49] Smith is paid $5.50 an hour. He testified that he, along with three other warehouse workers—excluding the tomato sorters, punches a timeclock.

> he checks on making sure we're doing the best that we can. He might come in and have a meeting with the bank, you know; be able to go over financials, you know, making sure that what he taught us was what we're doing;

that his father sometimes goes to the Distribution Center to buy for Respondent; that his father gave up his full-time duties at Respondent in 1987; that Kathy Borrelli is his and Kent's sister and she is T. K. Harvin's daughter; and that Respondent deals with about 200 vendors and about one-half of these know Respondent as Five K's and the remainder know Respondent as T. K. Harvin.

John Husilton, who is Respondent's comptroller, testified that Borrelli, between January and June 1993, was paid $66 a day by Respondent; that other warehouse employees who were paid by the day were Gehling, Oakley, and Wayne Johnson and they received $60 a day; that some of the warehouse employees were paid by the hour; that Borrelli had prior experience working for Respondent's retail market from 1979 through 1985 and her pay was based on her prior experience; that between January and June 1993 Borrelli spent most of her day in the warehouse sorting vegetables and fruits,[50] and she handled emergency deliveries;[51] that if Borrelli missed 1 day of work she would only be paid for 4 days that week; that if Borrelli worked overtime she was paid time-and-a-half; that Borrelli was not treated in any way differently than any other warehouseman or driver who worked for Respondent; that Borrelli had the same chain of command as other warehouse employees; and that Johnson, Gehling, and Oakley did not punch a timeclock but rather, like Borrelli they recorded their time on a logsheet. Also, their responsibilities were essentially the same as Borrelli's. Respondent's payroll records for the 2-week period ending March 14 show that Borrelli received gross pay of $880. This was also her gross pay, according to Respondent's payroll records, for the 2-week period ending March 28. Husilton testified that apparently Borrelli worked overtime during these two pay periods but this was not specifically indicated on the payroll records he was shown at the time of his testimony herein.

Keith Harvin testified that Borrelli was promoted in September or October 1993; that Respondent's policy regarding lateness, is if an employee is late once, they are spoken to, if the employee is late a second time, they are ''really spoken to,'' and if the employee is late a third time, they would be terminated; that the same policy applies to employees who are late and do not call in, namely ''[t]hey would get spoken to the first time, and then if it happened again, they would get yelled at, and then the third time, they would get suspended, and then the fourth time, they would be terminated''; that named employees were not suspended until they violated these rules three times and it would have been ''unfair'' to suspend them after they violated the rule twice; and that Borrelli's rate of pay was based on the experience she brought to the Company.

Regarding his position with Respondent, Walker testified that his title was warehouse supervisor; that he gave the delivery drivers their clipboards', went over inventory in the warehouse, condensed product, made room for loads of produce coming into the warehouse, checked the quality of product in the warehouse, made boxes, unloaded produce trucks from California, Idaho, or the Distribution Center after checking the quality of the shipment, picked orders, repackaged produce, cleaned up at the end of the day, checked delivery trucks to make sure they were clean and gassed up, and checked to make sure returned merchandise was placed in the refrigerators; that he and five other people worked in the warehouse at the time he was fired[52]; that as warehouse supervisor he counted merchandise and checked for quality, told workers how to make room for incoming produce, showed workers how to make room for incoming produce, helped with the unloading, called Keith or Kent Harvin if there was a problem with the quality of an incoming load, and signed the clipboards of Respondent's delivery drivers when they returned to the warehouse; that he reported to Keith and Kent Harvin; that he would give his opinion about a person but he did not have authority to hire; that Keith and Kent did the hiring and Walker did not participate in the interview process; that while he could suggest he could not fire; that he had no authority to lay off, recall, transfer, promote, reward, or approve time off for employees; that he could only suggest that an employee be disciplined; that he released warehouse employees at the end of the workday unless he was told that there was more work to be done; that he did not have either an office or a desk; that he never attended any supervisory meetings; and that he clocked in and out at the same timeclock used by the other warehouse employees. On cross-examination Walker testified that if the employees in the warehouse had a problem they would go to Keith or Kent Harvin; that in the absence of Keith and Kent the employees would come to him but most of the time, especially if it involved a major problem like quality, he would telephone and ask Keith or Kent; that he did not interview and hire Keith Rickett, Charles Laubsch, or Paul Gallagher; that Keith Harvin gave employee Alvin Grestry time off and Walker was directed to send Grestry a note; that he has suggested that employees be terminated and when Kent and Keith saw they were not producing they were terminated; that in the last 3 months before he was terminated he recommended three times that an employee be suspended and he was aware that at least on one of the occasions an employee was suspended; that he is paid a salary; that he, along with another employee, Jack Gallic, and John Livel, who ran the canned goods section, had keys to a freezer at Respondent's facility; that he never told warehouse employees that they had to work extra time but rather he asked them and if they left, he did the work himself; that he did not know if the warehouse employees were paid on an hourly basis or if they were salaried; that if one of the warehouse employees had to leave work early when Keith and Kent Harvin were in Wilmington, they would have to check with him or Borrelli; and that he signed for receipt of merchandise at the warehouse.[53] On further cross-examination Walker tes-

[50] Husilton estimated that this took about 80 percent of her time.

[51] Husilton estimated that Borrelli made emergency deliveries daily. He testified that other warehouse employees occasionally made warehouse deliveries.

[52] Walker did not include Borrelli in the five individuals he named.

[53] Walker testified that the only other persons who signed bills for the trucks from California were Kent, Keith, and Thomas Harvin.

tified that he, along with Keith, Kent, and Second-Shift Supervisor Satchell, had a key to the roll-up doors.

Kent Harvin testified that ''[t]he leader of the day crew was a gentleman by the name of Jeff Walker. He, that was his primary job to make sure that all stocks were replenished and everything, in what we refer to as front boxes.'' Kent Harvin also testified that everything that was at the shipping end of the warehouse ''had been checked for quality and that was the day crew's job.'' Walker, according to Kent Harvin's testimony, has the title day crew supervisor and he has the responsibility of, among other things, checking everything that came to the warehouse on the day market truck which were items Kent Harvin purchased at the Distribution Center. Additionally, Kent Harvin testified that contrary to Walker's testimony he did hire employees.[54] Regarding Walker disciplining employees, Kent Harvin testified that if anybody gave Walker any ''lip or back talk''; he could tell them to go punch out and go home; and that he told Walker that Walker could send an employee home who came in late. Kent Harvin also testified that most of the problems Walker would call him about centered around the produce; and that ''[p]ersonnel problems were primarily, he would talk to Keith about that. But if I was the first Harvin he got to he would talk to me about them too.'' Additionally, Kent Harvin testified that Walker had the authority to have employees work overtime or to allow them to leave work early and it was not necessary for him to get approval from the Harvins.

Husilton testified that Walker was Respondent's warehouse manager at the time of his termination; and that warehouse employees took their problems to Walker and if Walker was not around they would go to Keith Harvin.

Analysis

In my opinion Tunnel was unlawfully discharged.

On brief, counsel for the General Counsel contends that Respondent, in its own words, ''strongly'' opposed the Union in the union election campaign; that campaign statements not violative of the Act may be used to show antiunion animus, *Gencorp*, 294 NLRB 717 fn. 1 (1989); that while Respondent sought to inflate the importance of the broccoli rabe deliveries to Giunta's, even after leading questions from Respondent's counsel neither witness from Giunta's offered any testimony that there was any threat of termination of dealing with Respondent made or even considered; that if Respondent believed its business with Giunta's was at risk, it could have made an emergency delivery to this customer; that Respondent's rules and regulations which were in effect at the time specify progressive discipline, i.e., written warnings and suspensions before dismissal except for specified major offenses;[55] that ''it is unclear from Kent Harvin's testimony whether he believed Tunnell *had* cancer or *was* cancer'' (emphasis in original); that Respondent's ''angry man'' defense also presented a timing problem since Kent Harvin would have had to know about Giunta's reaction to the second case of broccoli rabe on Wednesday, March 24, when he told Doyle to tell Giunta's to throw the second case out; that the whole broccoli rabe incident is a red herring;[56] that Respondent's animus toward the Union is evident from its campaign literature, and the 8(a)(1) violations involved here; that Respondent's expressed reasons for terminating Tunnell are clearly pretextual, and they raise an inference that they were designed to conceal an unlawful motive, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); that while there is no direct evidence that Respondent knew of Tunnell's union activity before his termination, it has long been held that such knowledge may be proven by circumstantial evidence from which a reasonable inference may be drawn, *BMD Sportswear Corp.*, 283 NLRB 142, 143 (1987); that if the testimony of Kuhn is credited, Keith Harvin admitted that union activity was the reason for Tunnell's discharge; and that the record evidence establishes a prima facie case of unlawful discharge and Respondent has failed to meet its burden of establishing that it would have terminated Tunnell even absent discrimi-

[54] According to Keith Harvin's testimony, Walker hired Rickett and Gallagher. At one point Kent Harvin testified that Walker ''was instrumental in getting him [Gallagher] hired.'' Then Kent Harvin testified that Walker made the hiring decision with regard to Gallagher.

[55] Stealing, failure to report a traffic citation or accident, use of drugs or alcohol on the job, fighting on company property, or unauthorized use of company vehicles.

[56] Fn. 20 in counsel for the General Counsel's brief reads as follows:

> Respondent's entire broccoli rabe defense rests on the origin of the second bad case delivered to Giuntas, but Respondent's evidence left this case of produce shrouded in mystery. Respondent asserts that Tunnell purchased another case on the evening of March 23 (400–01), but Tunnell denied that he picked up another case that night. (95–101, 102–10, 136) Respondent could have settled the matter by producing Tunnell's order sheet from the evening of March 23 with his own markings on it, but instead it produced only the 'final copy' that was drawn up later by Satchell or who knows who. (105–07, 108–09, 146–51, 427–27, RX-1) Respondent's invoice from Pinto that week shows a purchase dated March 24 which could have been made either the evening of March 23 or during the day on March 24. (603–04, 608–10, 677–78, GCX-13a).
>
> Another troublesome fact: Respondent attempted to show that the first case of broccoli rabe delivered to Giuntas, which Giuntas returned to Harvin's driver on the morning of March 24, was returned to Pinto's for credit that evening. (424–25, RX-15) On further examination, however, it was revealed that the supposed receipt showing the return was not a receipt for credit at all (529–46, RX-15), and Pinto never gave Respondent credit for the supposed return. (565–66, 603–04, 606–08, GCX-12) These facts suggest that this case was never returned to Pinto, and that there was a reason it was not returned.
>
> It is entirely possible that the second case delivered to Giuntas was sitting in Respondent's warehouse from the previous week, and had gotten a little old. This was the season for broccoli rabe (462, 476), Keith Harvin (who ran the warehouse) testified that sometimes there were situations where Respondent purchased broccoli rabe without a special order and kept it around in case someone wanted it. (612) Or, it is also possible that the delivery driver at Giuntas on the morning of March 24 simply got his boxes mixed up, and after picking up the bad case and bringing it out to his truck, he redelivered it, and brought the new case back to the warehouse. This would be consistent with Donati's testimony that the second case looked the same as the first, if not worse. (470, 479) Either set of circumstances would explain why the first case delivered to Giuntas was not returned to Pinto. They would also explain why Kent Harvin never spoke a word to Pinto about selling him bad specialty produce two nights in a row, and even bought three times more cases from Pinto on Thursday, March 25. (495–98, 678.)

natory considerations, *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[57]

Respondent, on brief, argues that the General Counsel has not established a prima facie case in that it has not been shown that Tunnell engaged in protected activity before he was terminated, Respondent knew this and it was motivated by antiunion animus; that even if the General Counsel did establish the elements of the prima facie case, Respondent nonetheless had a legitimate, nondiscriminatory business justification for the termination; that there is no direct evidence that Respondent knew of Tunnell's union activities before his discharge; that any circumstantial evidence that Respondent knew of Tunnell's union activity before his discharge must be discounted since Tunnell had no idea whether anyone from management was in the vicinity during the conversation between him and Warner about union authorization cards on the morning of March 22 and Anderson denied having the alleged March 26 conversation with Tunnell in Respondent's office; that it is unlikely that the small plant doctrine, which is founded on the notion that management will learn quickly of union activity where it is waged openly in a small complement of employees, applies here in that Tunnell was careful not to discuss the Union with members of management and there are approximately 30 employees in the unit and Respondent's work force exceeds 50; that the General Counsel failed to prove the existence of antiunion animus; that assuming arguendo that the General Counsel established the elements of a prima facie case, Respondent demonstrated that it had a legitimate business justification for terminating Tunnell; that Tunnell's purchase of rotten broccoli rabe two nights in a row constituted a legitimate business justification for his dismissal; that Tunnell's denial of responsibility is not worthy of belief; that Tunnell's failure to inspect the broccoli rabe was the only possible explanation for the customer's receipt of the rotten broccoli rabe; that Tunnell's conduct warranted dismissal; that Tunnell's job performance on the night run had been called into question in the past; that after the first instance Kent Harvin had every reason to believe that Tunnell would inspect the replacement product purchased for Giuntas at the Distribution Center; that Kent Harvin concluded that Tunnell did not care about his job performance; that Respondent has discharged other employees for comparable errors impacting on its customer relations, namely Warner and Miller; and that since Tunnell did not meet with Donovan until after he purchased the first two rotten cases of broccoli rabe on the night of March 22 no inference of pretext can be drawn.

Donovan openly started the union campaign at Respondent's facility in early March. He placed union flyers on cars parked outside Respondent's Chester facility. Both Keith Harvin and his father went out and spoke to the union organizer. Respondent was aware before March 22 that the Union was attempting to organize Respondent's employees. Appendix C hereto, along with Appendices A and B, explain why Respondent ''strongly'' opposed the Union. As alleged by counsel for the General Counsel, Respondent's campaign literature and the 8(a)(1) violations found below demonstrate Respondent's antiunion animus.

Three of the employees who were most active in the union campaign Warner, Tunnell, and Walker were fired within a week of each other at the outset of the campaign.[58]

On Monday, March 22, just hours before Giunta's allegedly complained about its suspicions regarding Warner allegedly taking a purse and apparently before Guintas[59] even ordered the first of the involved cases of broccoli rabe (unless Giuntas placed its order before 6 a.m. on March 22) Warner and Tunnell discussed, 5 to 10 feet from an open door leading into Respondent's Chester warehouse, the fact that while Warner had obtained union authorization cards to be signed by the employees, he did not bring them with him to work. Warner said that he would bring the union authorization cards to work on Tuesday, March 23. While Warner and Tunnell were engaged in this conversation Keith Harvin came through the open door and said, ''Get them goddamn trucks moving now.'' Keith Harvin never specifically denied saying this and being present at the time to make this statement. The only question is whether Keith Harvin overheard, notwithstanding the fact that there were two diesel trucks idling nearby at the time, what was being discussed by Warner and Tunnell about union authorization cards. On the one hand, Keith Harvin did not admit that he overheard this conversation.[60] On the other hand, he did not specifically deny being in a position to overhear this conversation. Keith Harvin did not even testify about where he was and what he may or may not have heard at about 6 a.m. on March 22 outside Respondent's warehouse in Chester.

As pointed out by the Board in *BMD Sportswear Corp.*, 283 NLRB 142 and 143 (1987):

> It has long been held that where there is no direct evidence knowledge may be proven by circumstantive evidence from which a reasonable inference may be drawn. *NLRB v. Wal-Mart Stores*, 488 F.2d 114, 117 (8th Cir. 1973). See generally *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941). Such circumstances may include proof of knowledge of general union activity, the employer's demonstrated animus, the timing of the discharge, and the pretextual reasons for the discharge asserted by the employer. *General Iron Corp.*, 218 NLRB 770, 778 (1975), enfd. 538 F.2d 312 (2d Cir. 1976). See also *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808 (3d Cir. 1986), enfg. 277 NLRB 1179 (1985). In addition, the discharge of an employee who is not known to have engaged in union activity but who has a close relationship with a known union adherent may give rise

[57] The Union, which filed a brief on Objections to Election and Challenged Ballots, joins in counsel for the General Counsel's brief.

[58] As noted above, Respondent reached an out-of-Board settlement with Walker. Consequently, the merits of his discharge were no longer at issue herein. Warner, as noted above, failed to cooperate or appear. No findings are made herein regarding the lawfulness of either of these discharges.

[59] Interestingly of Respondent's 200 to 300 customers, the same customer, Guinta's, played a role in both Warner's and Tunnell's terminations.

[60] As noted above, Kent Harvin testified that he and his brother Keith were not aware at the time of Tunnell's discharge that he was interested in the Union or active in a union drive. Keith Harvin, with respect to Kuhn's allegation that Keith admitted that Tunnell's firing was unlawful, testified that he Keith did not fire Tunnell because be brought in the Union.

> to an inference of discrimination. See *Permanent Label Corp*., 248 NLRB 118, 136 (1980), enfd. 657 F.2d 512 (3d Cir. 1981). Thus a discharge motivated by an employer's belief or suspicion that an employee engaged in union activity violates the Act. Id.

As indicated above, when called at the outset of the hearing by counsel for the General Counsel Keith Harvin testified that the decision to terminate Tunnell was made on Monday, March 29. After hearing his brother Kent testify here, Keith testified that the decision to terminate Tunnell was made on Thursday, March 25. From a timing standpoint, the problem with this changed testimony is that if one accepts Respondent's scenario and the basis provided for this action, the decision would have been reached on Wednesday, March 24. Donati testified that he did not want to keep the second case of broccoli rabe in his store overnight and he was told by Doyle to throw it out. Kent Harvin testified that he told Doyle to tell Donati to throw out the second case. According to the scenario Respondent presents this was done on Wednesday, March 24. Consequently Kent Harvin would have been in a position on March 24 to decide to terminate Tunnell.

Many aspects of Respondent's presentation cause me concern. After unsuccessfully attempting to have Tunnell testify on cross-examination that Respondent's Exhibits 1 and 2 were the lists covering night run pickups for March 23 and 22, respectively, one of Respondent's counsel stated that he would call Satchell to testify. Satchell, one of Respondent's supervisors, according to Kent Harvin's testimony, drafted these two documents in collaboration with Tunnell. Tunnell denied this, testifying that he had never seen the documents before. Satchell, notwithstanding Respondent's counsel's declared intent, was not called as a witness by Respondent. Consequently, Satchell did not deny that he specifically told Tunnell on March 22 that Kent Harvin wanted Tunnell to check the broccoli rabe at Pinto. Consequently, Satchell did not deny that Tunnell telephoned him from the Distribution Center and said that Tunnell had two good cases of broccoli rabe.[61]

While Kent Harvin testified that Tinnin, to the extent necessary, obtained the prices charged Respondent from Respondent's computer or the vendors and put them on the night truck pickup list so he could determine, sometime after speaking to Kent Harvin, how much to charge the customer, while Tinnin did put prices on the March 23 Hercules and Giunta's delivery tickets (R. Exhs. 11 and 14-1), respectively, while the purported night truck list for March 22 lists prices for the other items picked up that night, it does not list prices for the broccoli rabe picked up on the night run on March 22. Instead written where the prices normally go is the word ''Return.'' Kent Harvin's explanation that ''if we were going to return it, price becomes irrelevant'' begs the question. Counsel for the General Counsel specifically raised the question of when the word ''Return'' was placed on Respondent's Exhibit 2, speculating that it could not have been put there on the night of March 22. One would expect, if Respondent's Exhibit 2 was drafted on the night of March 22 that the prices would appear on the list. If at a later date, both cases were returned then one would expect a notation indicating such along with the price which had already been placed on the sheet, unless the price was subsequently erased or white out was used. In the latter case one would expect some kind of explanation. None was offered.

This leads to the question of whether both of the cases picked up on March 22 were returned to Pinto. Kent Harvin testified that both were returned to Pinto for credit. Kent Harvin sponsored an exhibit (R. Exh. 15), which he claims demonstrates that Giunta's first case was returned to Pinto on March 24. Notwithstanding the fact that when he testified he knew that Pinto had not given Respondent a credit for the return of Guinta's first case. Kent Harvin did not volunteer this information; it came out with questions I asked of this witness. This raises additional questions in that Kent Harvin testified that it is Respondent's policy to have a representative of the vendor sign the return slip. Respondent's Exhibit 15, the ''3/24/93'' return slip is not signed by a representative of the vendor. This was pointed out during the hearing. Respondent did not call the March 24 night driver to explain why it was not signed by a representative of the vendor. Kent Harvin also testified that it is Respondent's practice to leave one of the copies of the return slip with the vendor so that Respondent's account can be credited. Respondent's account was not credited with a March 24 return. The night driver was not called as a witness to testify whether he left one of the copies of the return slip with Pinto on March 24. And finally since whether there was a return on March 24 became an issue herein, one would expect Respondent to call the driver who handled the night run that night to testify that he physically did handle a return case of broccoli rabe to Pinto on March 24. Respondent did not call the driver who handled the March 24 night run to testify that he physically handled one returned case of broccoli rabe which he brought to Pinto.

As noted above, at one point Kent Harvin testified that when he read Wednesday's (March 24) hot sheet he

> found out that the *one* box of broccoli rabe that he had bought on the night truck and delivered the day before was, back to Giuntas, was bad. And I like beside myself. I am saying, ''Jesus Christ, two days in a row!'' [Emphasis added.]

Contrary to the impression that Kent Harvin attempts to convey, Wednesday's hot sheet (R. Exh. 16), does not speak to the case that was delivered ''back to Giuntas.'' Wednesday's hot sheet covers the pickup of the first case which was delivered to Giunta's the day before. As Kent Harvin himself testified there was no hot sheet for the second case delivered to Giunta's which allegedly was thrown out. Since he spoke

[61] Donati testified that there was no ice in the broccoli rabe he received. If the case he received on March 23 was one of the cases Tunnell picked up the night of March 22 this would be consistent with Tunnell's testimony that he removed the ice to inspect all of the broccoli rabe, and he did not replace it. If Tunnell were only interested in saving time, he could have taken the first two cases available, he would not have checked whether they were iced, and he would not have taken all of the ice out of the case to inspect the contents. Tinnin testified that in March broccoli rabe would not normally have to be iced. And Donati, who testified that there should be ice mixed in the product, also testified that if the broccoli was purchased good on March 22 it would not have been in the condition of the broccoli rabe he received on March 23 ''unless it was stored in an oven. . . . and even then, the florets wouldn't have turned yellow.''

to Tunnell on Tuesday, March 23, about the first case delivered to Giuntas, Wednesday's hot sheet would not reveal anything Kent did not already know.

Also as noted above while Keith Harvin testified that there were some situations where Respondent would purchase broccolli rabe when it is not on special order, Kent Harvin testified that he would not have purchased broccoli rabe on March 25 if he did not have a special order for it.

The picture painted by Respondent was not as bad as Kent and Keith portray it to be. One receives the impression from these two witnesses that the broccoli rabe in question was rotten. After eliciting testimony from Tunnell on cross-examination that rotten broccoli smells bad and the odor could be detected from at least 15 feet away counsel for Respondent apparently realized the full ramifications of this testimony. He subsequently elicited testimony from Tunnell that ice and cold weather can sometimes mask the smell. If the broccoli rabe delivered to Giunta's was rotten Donati would have known its condition before he opened the case. There was no ice to mask the smell and there is no indication that the broccoli was not left inside at Giunta's. If it was rotten while it was sitting without ice in Respondent's facility before being loaded onto a delivery truck, would not someone have noted the problem. Also, while Kent and Keith Harvin attempt to convey the impression that their business with Giunta's was in jeopardy, this was not specifically indicated to Doyle or Kent or Keith Harvin. And as counsel for the General Counsel points out, if Respondent was concerned about losing Giunta's business would not it have had Kathy Borrelli drive the approximately 10 miles to the Distribution Center, pick up a case of broccoli rabe and then drive it the approximately 25 miles to Giunta's.

And finally there is Keith Harvin's testimony that after the aforementioned petition was filed on April 6 he was told by consultants that, among other things, Respondent could not fire an employee for union activity. Keith did not testify that either he or his brother Kent knew this before it was mentioned by the consultants. The three most active union adherents, including Tunnell, were fired before Keith spoke with the consultants.

When one considers the timing,[62] the union animus, Keith's failure to unequivocally deny that he overheard what Warner and Tunnell were talking about at 6 a.m. on March 22, the changing testimony and the contradictions of Respondent's witness, the failure of the documentary evidence introduced by Respondent to fully support its version of the involved events, the failure of Respondent to call witnesses who would have been in a position to explain what occurred, i.e., Supervisor Satchell, who Respondent indicated it would call but never did, and the fact that apparently Respondent's management was not even aware before Keith spoke to the consultants sometime after April 6 that it was unlawful to terminate an employee for union activity, it is reasonable to infer that Respondent knew of Tunnell's union activity on March 22. Counsel for the General Counsel has made a prima facie showing. As pointed out by the Board in *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984), which cites the Supreme Court decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), ''in rebutting the General Counsel's prima facie case—that the protected conduct was a 'motivating factor' in the employer's decision—an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place in the absence of protected conduct.'' In my opinion, Respondent has not presented a legitimate reason for its action and, even if the alleged reason existed, it has not demonstrated, in view of its failure to follow its own rules and regulations, and its refusal to keep Tunnell on as a day driver, that Tunnell would have been discharged in the absence of his union activities. I conclude, therefore, that Respondent violated Section 8(a)(3) and (1) of the Act as alleged in discharging Tunnell.

In my opinion Respondent through Keith Harvin unlawfully solicited employees' complaints and grievances from Walker.

On brief, the General Counsel contends that Respondent does not deny that Keith Harvin asked about employee complaints but it asserts that Walker was a supervisor; that while Walker's title was ''warehouse supervisor,'' he was actually a leadperson; that Tinnin, who worked the third shift, also carried the title ''warehouse supervisor,'' was salaried, was paid more than Walker, told warehouse employees what to do, handled employee problems, and checked produce brought back by the night truckdriver; that for most of Tinnin's shift there were no management personnel at the facility; that Tinnin voted in the election without challenge by the Employer or anyone else; that Walker testified credibly that he had no 2(11) authority other than some responsibility to assign and direct employees and his exercise of this responsibility was clearly limited and routine in nature; and that while Keith Harvin had asked Walker before about problems in the warehouse, Harvin's explanation for his inquiry on this occasion—''by the time you find out about it, it's too late to do anything about it''—obviously referred to the employees' union activity, and further suggested that he intended to satisfy the employees' grievances in order to forestall unionization.

Respondent, on brief, argues that conversations between Walker and Keith Harvin do not constitute solicitation of grievances since Walker was a statutory supervisor; that the evidence in the record indicates that Walker's supervisory duties are more than strictly routine; that Walker had the authority to hire and his hiring recommendations directly resulted in the hiring of the individual recommended; that Walker had the authority to discipline; that Walker admitted that his ''suggestions'' had resulted in the termination of 'at least one employee'; that Walker was salaried; and that the testimony suggests that the alleged solicitation of grievances by Keith Harvin constituted merely a conversation about employee concerns, consistent with the regular discussions held on this topic between Keith and Kent Harvin and Walker.

As pointed out by the administrative law judge in *Chicago Metallic Corp.*, 273 NLRB 1677, 1688–1689 (1985), affd. 794 F.2d 527 (9th Cir. 1986):

> Section 2(11) of the Act provides:
>
> The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire,

[62] Both with respect to the discharge and with respect to a lack of appreciation thereof on the part of Kent Harvin in that according to Respondent's version of events he would have known about the second case to Giunta's on Wednesday, March 24, and not, as he testified, March 25.

> transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Supervisors are excluded from coverage of the Act.[64] In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with ''genuine management prerogatives'' should be considered supervisors, and not ''straw bosses, leadsmen, setup men and other minor supervisory employees.''[65]

The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification.[66] It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act.[67] To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer supervisory status.[68] However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions.[69] Indeed, as the court stated in *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1098 (6th Cir. 1981):

> regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor.

Thus, the exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, ''the test must be the significance of his judgment and directions.''[70] Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees.[71] Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees.[72] Additionally, the existence of independent judgment alone will not suffice for, ''the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act.''[73] In short, ''some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former.''[74] Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

The burden of proving that an employee is a ''supervisor'' within the meaning of the Act rests on the party alleging that such status exists.[75] In making determinations regarding supervisory status, ''the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intendent to protect.''[76]

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[64] Section 2(3) of the Act provides:

> The term ''employees'' shall include any employee . . . but shall not include . . . any individual employed as . . . a supervisor . . . .

Section 14(a) of the Act provides:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to the Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local relating to collective bargaining.

See *Florida Power & Light Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790 (1974); *Beasley v. Food Fair of North Carolina*, 416 U.S. 653 (1974).

[65] S. Rep. No. 105, 80th Cong., 1 Sess. 4 (1947).

[66] *New Fern Restorium Co.*, 175 NLRB 871 (1969); *Food Store Employees Local 347 (G.C. Murphy Co.) v. NLRB*, 422 F.2d 685 (D.C. Cir. 1969); *NLRB v. Bardahl Oil Co.*, 399 F.2d 365 (8th Cir. 1968).

[67] *Advanced Mining Group*, 260 NLRB 486 (1982); *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982); *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959).

[68] *NLRB v. Ajax Tool Works*, 713 F.2d 1307 (7th Cir. 1983); *NLRB v. Bergen Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982); *NLRB v. Joe & Dodie's Tavern*, 666 F.2d 383 (9th Cir. 1982).

[69] *NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981); *Poultry Enterprises v. NLRB*, 216 F.2d 798 (5th Cir. 1954).

[70] *NLRB v. Wilson-Crissman Cadillac*, supra; *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968).

[71] *NLRB v. Wilson-Crissman Cadillac*, supra; *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772 (9th Cir. 1973).

[72] *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968); *NLRB v. Merchants Police, Inc.*, 313 F.2d 310 (7th Cir. 1963).

[73] *Advanced Mining Group*, 260 NLRB 486 (1982); *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (lst Cir. 1948).

[74] *Advanced Mining Group*, supra; *NLRB v. Security Guard Service*, 384 F.2d 143 (5th Cir. 1967).

[75] *RAHCO, Inc.*, 265 NLRB 235 (1982); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979); *Commercial Movers*, 240 NLRB 288 (1979).

[76] *RAHCO, Inc.*, 265 NLRB 235 (1982); *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151 (7th Cir. 1979), cert. denied 400 U.S. 831 (1970).

Has Respondent met its burden of proof? In my opinion it has not. Respondent has not shown that Walker possessed authority to use independent judgment with respect to the exercise of some one or more of the specific authorities listed in Section 2(11) of the Act. Walker impressed me as being a credible witness. Kent Harvin was not a credible witness. As described above, Kent Harvin's testimony with respect to the Tunnell termination undermined Kent Harvin's credibility entirely in my opinion.[63] Walker was expected to accomplish certain things during the day. There were warehouse workers to help him. If the workers did not do their fair share, Walker would stay late to make sure the work was done. If for some reason the workers did not do their fair share Walker reported this to the Harvins with suggestions as to what should be done. When the problem was obvious to the

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[63] It is noted that while Kent Harvin testified that Walker had the title day crew supervisor, Kent Harvin also described Walker as the leader of the day crew.

Harvins, Walker's suggestions were followed. On the other hand, other of Walker's suggestions regarding the warehouse employees were not followed. While Kent Harvin testified that Walker had the title of day crew supervisor, Respondent, in effect, contends that Walker does not know what he is talking about when he testified that Borrelli was not a warehouse worker. Although Borrelli testified that when she started in 1991 Keith Harvin and Walker were her supervisors, she did not specifically deny Walker's testimony that in 1993 when Keith and Kent Harvin were in Wilmington getting that facility ready he, Walker, answered to Borrelli who contacted Keith or told him, Walker, what to do. Perhaps an accurate gauge of what Walker believed was his ''kinship to management'' was his acquiring warehouse employees signatures on union authorization cards. Walker did not have authority to use independent judgment in the areas traditionally associated with being a supervisor including hiring, transferring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding, or disciplining other employees, or the responsibility to direct them or adjust their grievances as to effectively recommend such action. In the circumstances present here it is my opinion that Walker was not a supervisor as that term is defined in the Act.[64]

Since Walker was not a supervisor, Keith Harvin's question, which went beyond what he may have asked in the past because Keith did not deny saying ''by the time you find out about it, it's too late to do anything about it'' and he did not assert that he had ever used this language before with Walker, violated the Act. As contended by counsel for the General Counsel, Keith Harvin suggested that he intended to satisfy the employees' grievances in order to forestall unionization.

Paragraph 6 of the complaint, issued August 31 in Case 4–CA–21892, as amended at the hearing herein, alleges that Keith Harvin (1) in mid-April (a) interrogated an employee concerning the employee's union sympathies, and (b) promised an employee a wage increase and an award of a dispatcher's job in order to discourage the employee from supporting Local 929; (2) on or about June 6 created an impression among its employees that their Local 929 activities were under surveillance by Respondent by asking an employee how a Local 929 meeting had been and interrogated an employee concerning the activities of its employees on behalf of Local 929; (3) in or about mid-April 1993 by soliciting employees' complaints and grievances, promised employees increased benefits and improved terms and conditions of employment if they abandoned their support for Local 929; and (4) in or about mid- or late April 1993 told an employee that other employees have been discharged because of their union activity.

Counsel for the General Counsel, on brief, contends that if Kuhn is credited, then Keith Harvin's questions to Kuhn at a meeting just after the organizing campaign had begun, and in the midst of their discussion about Kuhn's proposed dispatcher position and raise, about whether he had heard about employees' union activities and how he felt about the Union constituted an unlawful interrogation about union sympathies and activities, *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); that Keith Harvin's questions to Kuhn about the drivers' concerns constituted an unlawful solicitation of grievances, *Astro Printing Services*, 300 NLRB 1028, 1034 (1990), and Harvin's indication that if the Union was kept out he could ''hit [Kuhn's] number'' amounted to a promise of a dispatcher's job and a wage increase in order to discourage Union support, *Bon Marche*, 308 NLRB 184, 197 (1992); that Harvin's statement to Kuhn that Tunnell was fired because of his union activities constituted an unlawful threat of discharge for engaged in protected activity, *J.F.L. Painting & Decorating*, 303 NLRB 1029 (1991); and that Keith Harvin's question to Kuhn about how the union meeting went unlawfully created the impression that the employees' union activities were under surveillance and constituted an unlawful interrogation about these activities, *Bon Marche*, supra and *Sunnyvale Medical Clinic*, supra.

Respondent, on brief, argues that the record contains substantial evidence to justify discrediting Kuhn, namely, (1) the Board's refusal to issue a complaint because of insufficient evidence regarding that portion of the charge filed by Kuhn alleging that Respondent threatened to terminate him because of his union activities; (2) ''the record contains corroborated evidence that Mr. Kuhn attempted to bribe Keith Harvin in exchange for influencing drivers to vote against the Union''; and (3) Kuhn is at best, an opportunist in that while he initially asserted that his concern for Tunnell prompted him to ask about Tunnell's dismissal, Kuhn later admitted that he worried that Tunnell would return to work and that Kuhn would have to give up Tunnell's route; that Keith Harvin's testimony that Kuhn was intoxicated when he attended the party for the opening of the Wilmington facility undermines Kuhn's credibility because it is inconceivable that Keith Harvin would confide the reason for Tunnell's termination to ''such a troubled, unstable individual'';[65] that given the lack of corroborating testimony by Gheling, as well as the lack of credibility to be attached to Kuhn's testimony, the allegation that Keith Harvin engaged in surveillance of the union activities in violation of the Act is without merit; that there is insufficient evidence to establish solicitation of grievances or a promise of benefits by Keith Harvin; and that there is insufficient evidence to establish that Keith Harvin made promises of benefits.

I did not find Keith Harvin to be a credible witness. As noted above, he changed his testimony regarding the termination of Tunnell. Timing helped undermine Respondent's version of what caused the Tunnell termination. The timing of what allegedly occurred between Kuhn and Keith Harvin days before the involved election also raises questions. More than once Keith Harvin testified that Kuhn solicited the bribe on Wednesday and Keith told Kuhn that it would be illegal and Keith could go to jail for that. Keith testified that he spoke to Respondent's attorney by telephone on Friday because it was too late Thursday to get him. Apparently in giving this testimony, notwithstanding the gravity of the situation, he did not for some reason believe that it was necessary to explain why if, as alleged, Kuhn solicited a bribe after returning from his deliveries on Wednesday. Keith waited until

[64] The testimony of Respondent's controller, Husilton, does not establish that Walker was a supervisor under the Act.

[65] If Respondent truly felt this way about Kuhn after the opening party, one would have to wonder why it allowed him to continue to operate one of its motor vehicles. Additionally, if this, under the scenario presented by Keith Harvin, was the first time Kuhn engaged in such conduct (there is no testimony indicating otherwise) timing undermines this argument for the involved opening occurred in May which is after Keith Harvin's alleged statement to Kuhn.

''too late in the day Thursday to get a hold of [his] attorney.'' Keith Harvin testified as follows regarding the fact that he allegedly first spoke to his attorney about the matter on Friday, June 11:

> THE WITNESS: And he, he [not I?] had got a hold of Mr. Cabot because he—on Friday because he wanted to know what the outcome of the election was. I mean, he was readily available by phone on Friday because of the election outcome.

In other words, allegedly this matter was first raised with Respondent's attorney in a discussion involving the fact that earlier that day of the number of valid votes counted (excluding challenged ballots) 12 were for the Petitioner Union and 11 were against the Petitioner Union. Respondent points out that this allegation is corroborated by Anderson at least to the extent that Kuhn allegedly told him that he was going to solicit a bribe from Keith Harvin. The problem with Anderson's testimony is that it is not logical or even more basically it does not make sense. Anderson testified:

> Well, Frank approached me about five o'clock in the morning, and he mentioned something about he was going to ask Harvin for a substantial amount of money. I think it was, like $5000, to buy some no-votes so the Union couldn't come in. It was to be contingent on everybody would have been paid at the end of the day, had the Union—if they lost the election.
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> . . . .
>
> I guess he figured why don't they get . . . $500 a piece. . . .
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> . . . .
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> [There was] . . . approximately ten drivers.
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> . . . .
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> Q. . . . is that the extent of the conversation, sir?
>
> A. That was about it.

According to the scenario the drivers were not going to get paid before the vote but rather after the vote and only if the Union lost. Since there were 32 eligible voters and only 10 drivers, the drivers alone were not going to determine the outcome of the vote. More importantly there is a missing ingredient. It would make no sense whatsoever for Kuhn to tell Keith Harvin that he Kuhn would deliver the drivers' vote for $500 a piece which is going to be paid after the outcome without first asking the individual drivers if they were willing to sell their vote for $500. Anderson was asked by counsel for Respondent if that was ''the extent of the conversation.'' Anderson never testified that Kuhn asked him if he was willing to vote no for $500. Much of the testimony Anderson gave on March 7, 1994, was in response to leading questions. As noted above, at one point Anderson testified, ''[T]o be as honest as I can.'' I am always concerned when someone says ''to be honest'' for I have found that more often than not these words precede a statement which is anything but totally honest. Here, Anderson was either taking it a step further or he was telegraphing something wittingly or unwittingly when he testified ''to be as honest as I can.''

I do not credit the testimony of either Keith Harvin or Anderson regarding the solicitation of a bribe. And I do not credit the testimony of Keith Harvin with respect to the statements that he made to Kuhn. I find Kuhn's testimony, as it relates to the above-described violations, to be credible. As alleged in the involved complaint, and for the reasons set forth in counsel for the General Counsel's brief, as set forth above, I find that Respondent violated the Act through Keith Harvin as alleged in paragraph 6 of the complaint in Case 4–CA–21842, as described above.

With respect to the ballots challenged by counsel for the General Counsel, as noted above, Warner failed to cooperate or appear at the hearing. The allegation that Warner was unlawfully terminated was dismissed at the request of counsel for the General Counsel. Maxwell also did not appear at the hearing and the Union withdrew its contention that Maxwell was still an employee. The ballots of these two individuals should remain unopened and uncounted. These challenges are sustained. As concluded above, Tunnell was unlawfully terminated. He is an eligible voter. His ballot should be opened and counted. Regarding the ballots challenged by the Union, as noted above, the Union withdrew its challenge to Brightwell. His ballots should be opened and counted. For the reasons set forth below, I believe that the ballot of Borrelli should remain unopened and uncounted. The challenge to her ballot is sustained. In conclusion, therefore, only the challenged ballots of Tunnell and Brightwell should be opened and counted.

The Union, on brief, contends that Borrelli is not an employee and lacks community of interest with other employees and therefore Borrelli is not eligible to vote; that the United States Supreme Court has established that the Board has broad authority to exclude from the bargaining unit relatives of management even if they do not receive any special job-related benefits, *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985); that the Board may look to see if the individual's interests are more likely to be aligned with the business interests of the family than with the interests of the employees. Id. at 498–499; that Borrelli is the daughter of the former owner and the sister of the two co-owners of Respondent; that Respondent is still known to part of the involved industry as 5K's and Kathy Borrelli is one of the 5K's; that it was Borrelli who made the Employer's objection that the two ballots had been folded together implying that someone voted twice; that Borrelli, notwithstanding her denial on cross-examination, referred to Respondent's employee Oakley as ''one of my employee[s]''; that while Borrelli and Husilton testified that Borrelli was paid $66 a day the records received at the hearing herein reveal that Borrelli was paid $880 during the two pay periods covered and the records do not show that Borrelli, as testified to by Husilton, worked overtime during these two pay periods; that Borrelli reaps substantial financial benefit solely by virtue of her family status, making more money during the two pay periods covered than Walker, who Respondent claims is a supervisor; that employees who receive pay significantly higher than the bargaining unit based on their family status are not eligible to vote, *Blue Star Ready Mix Concrete Corp.*, 305 NLRB 429 (1991); and that by definition the Act exempts any person employed by ''his parent or spouse'' and since Thomas Harvin is still involved on a part-time basis with the business, Borrelli, who is Thomas Harvin's daughter, is by definition not an employee and, therefore, not eligible to vote, *Springhill Services*, 295 NLRB 1021 (1989).

Respondent Employer, on brief, argues that the Union's challenge to Borrelli has no factual or legal basis; that Borrelli's job responsibilities are comparable to other warehouse workers; that Borrelli's terms and conditions of employment mirror those within the unit; that Borrelli received no special job-related benefits; and that Borrelli's familial ties are not sufficient to align her interests with management.

In *NLRB v. Action Automotive, Inc.*, supra at 494, 495, and 496, the majority of the Supreme Court[66] indicated:

> Section 9(b) of the Act vests in the Board authority to determine ''the unit appropriate for the purposes of collective bargaining.'' 61 Stat. 143, 29 U.S.C. Section 159(b). The Board's discretion in this area is broad, reflecting Congress' recognition ''of the need for flexibility in shaping the [bargaining] unit to the particular case.'' *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134, 64 S.Ct. 851, 862, 88 L.Ed. 1170 (1944). The Board does not exercise the authority aimlessly; in defining bargaining units, its focus is on whether the employees share a ''community of interest.'' See *South Prairie Construction Co. v. Operating Engineers*, 425 U.S. 800, 805, 96 S. Ct. 1842, 1844, 48 L.Ed. 2d 382 (1976) (per curiam); 15 NLRB Ann. Rep. 39 (1950). A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165, 61 S.Ct. 908, 918, 85 L. Ed. 1251 (1941), and prevents a minority interest group from being submerged in an overly large unit, *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172–173, 92 S.Ct. 383, 393–394, 30 L.Ed. 2d 341 (1971).
>
> The Board has long hesitated to include the relatives of management in bargaining units because ''their interests are sufficiently distinguished from those of the other employees.'' *Louis Weinberg Associates, Inc.*, 13 NLRB 66, 69 (1939). From the earliest days of the Wagner Act, ch. 372, 49 Stat. 449 et seq., until 1953, the Board automatically excluded close relatives of a manager or owner of a closely held company. See, e.g., *Jerry and Edythe Belanger*, 32 NLRB 1276, 1279, and n. 4 (1941). This bright-line approach was abandoned, however, in *International Metal Products Co.*, 107 NLRB 65, 67 (1953), and now the Board considers a variety of factors in deciding whether an employee's familial ties are sufficient to align his interests with management and thus warrant his exclusion from a bargaining unit.[4]
>
> For instance, a relevant consideration is whether the employee resides with or is financially dependent on a relative who owns or manages the business; such an employee is typically excluded from the unit. See, e.g., *Pandick Press Midwest, Inc.*, 251 NLRB 473, 473–474 (1980). The greater the family involvement in the ownership and management of the company, the more likely the employee-relative will be viewed as aligned with management and hence excluded.[5] See factors listed in *NLRB v. Caravelle Wood Products, Inc.*, 466 F.2d 675, 679 (CA7 1972). The Board, of course, is always concerned with whether the employee receives special job-related benefits such as high wages or favorable working conditions. See, e.g. *Holthouse Furniture Corp.*, 242 NLRB 414, 415–416 (1979). When other criteria satisfy the Board that the employee-relative's interests are aligned with management, however, he may be excluded from the unit even though he enjoys no special job-related benefits. E.g., *Marvin Witherow Trucking*, 229 NLRB 412, 412–13 (1977).
>
> Our review is limited to whether the Board's practice of excluding some close relatives who do not enjoy special job related benefits has a ''reasonable basis in law.'' *NLRB v. Hearst Publications, Inc.*, supra, 322 U.S., at 131, 64 S. Ct., at 861. In reviewing Board decisions, we consistently yield to the Board's reasonable interpretations and applications of the Act, see *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829–830, 104 S. Ct. 1505, 1510–1511, 79 L. Ed. 2d 839 (1984); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891, 104 S.Ct. 2803, 2808, 81 L. Ed. 2d 732 (1984). Indeed, the Board's orders defining bargaining units are ''rarely to be disturbed.'' *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491, 67 S. Ct. 789, 793, 91 L. Ed. 1040 (1947).
>
> The Board's policy regarding family members, although not defined by bright-line rules, is a reasonable application of its ''community of interest'' standard.[6] Close relatives of management, particularly those who live with an owner or manager, are likely to ''get a more attentive and sensitive ear to their day-to-day and long-range work concerns than would other employees.'' *Parisoff Drive-In Market*, 201 NLRB 813, 814 (1973). And it is reasonable for the Board to assume that the family member who is significantly dependent on a member of management will tend to equate his personal interests with the business interests of the employer. Ibid. The very presence at union meetings of close relatives of management could tend to inhibit free expression of views and threaten the confidentiality of union attitudes and voting. See generally, ibid.; *NLRB v. Hendricks. County Rural Electric Membership Corp.*, 454 U.S. 170, 193–94, 102 S.Ct. 216, 230, 70 L. Ed. 2d 323 (1981) (POWELL, J., concurring in part and dissenting in part).

[66] Justice Stevens, with then Justice Rehnquist and Justice O'Conner joining, dissented.

[4] The Board's policy is not undermined by the fact that it has modified and refined its position; an agency's day-to-day experience with problems is bound to lead to adjustments. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294–295, 94 S. Ct. 1757, 1771–1772, 40 L. Ed. 2d 134 (1974).

[5] Compare *Parisoff Drive-In Market, Inc.*, 201 NLRB 813 (1973) (excluding children of corporation's vice president and significant shareholder), with *Pargas of Crescent City, Inc.*, 194 NLRB 616 (1971) (including wife of local manager with no ownership interest).

[6] At least since *International Metal Products Co.*, 107 NLRB 65, (1953), the Board has not excluded an employee simply because he was related to a member of management.

The business involved herein, a closely held corporation, is a family business. Respondent does business under more

than one name, viz, T. K. Harvin and Sons. Inc. and 5K's.[67] Kathy Harvin Borrelli is one of the 5K's. The business was operated by Thomas Harvin before he retired. As noted above, even now Thomas Harvin, to a limited extent, is involved in the operation of the business, for as Keith Harvin testified, his father ''might come in and have a meeting with the bank, you know; be able to go over financials.''

In *Action Automotive, Inc.*, supra, the Court agreed with the Board that without making a finding that a close relative of management enjoyed special job-related privileges, the close relative could be excluded from the involved collective-bargaining unit if it were found that the close relative's interests were different from those of other employees in the unit or more closely aligned with management than with the employees.

Unlike the two employees in question in *Action Automotive, Inc.*, supra, Borrelli does not live with one of the owners, namely, Kent or Keith Harvin. But in that case the company had a number of facilities in different cities. There it was pointed out that the mother of the three owners of the company, all of whom were closely related and actively involved in the running of the company, in addition to being an employee of the company, lived with one of her sons and she had daily contact with her sons. This was enough to justify the conclusion that her interests were more likely to be aligned with the business interests of the family than with the interests of the employees. Here the Respondent Employer had only its warehouse and office in Chester and now it operates a facility in Wilmington. Except for when he was in Wilmington getting that facility ready to open, Borrelli worked in the same facility as her brother Keith on a day-to-day basis. And while her brother Kent had his office across the street from the warehouse in Chester, he was in the warehouse to sort tomatoes and to speak to employees, i.e., to Tunnell on March 23. Additionally, Borrelli had to go into the office building every workday to sign the logbook. Borrelli has day-to-day contact with her brothers. Additionally, Borrelli does not deny that while Kent and Keith were in Wilmington getting that facility ready to open Walker, who Respondent alleges is a supervisor, answered to her in Chester, she acted as liaison between the warehouse work force in Chester and Kent and Keith in Wilmington, and some employees came to her when they wanted permission to leave work in Chester early.

In my opinion, under the circumstances present here Borrelli's interests are more likely to be aligned with the business interests of the family than with the interest of the employees.[68] The very presence at union meetings of Borrelli could tend to inhibit free expression of views and threaten the confidentiality of union attitudes and voting.

As indicated above, T. K. Harvin and Sons, Inc. filed objections to conduct allegedly affecting the results of the election. As here pertinent, in his Supplemental Decision on Objections to Election dated October 6, 1993 (G.C. Exh. 1(v)), the Acting Regional Director for the Region 4 of the Board, pointed out that since the Employer submitted no evidence in support of Objection 1, it was dismissed. The remaining objections, are as follows:

> *Objection 2:*
>
> Local 929, by and/or through its agents or adherents, engaged in improper balloting procedures.
>
> T. K. Harvin avers that an individual may have obtained two (2) ballots at the same time, executed both in favor of Local 929, folded the ballots and then placed them in the ballot box. When the election was concluded, the Board Agent began tabulating the ballots. At one point, a ballot was retrieved. Actually, the ballot contained two ballots. The ballots were folded together in such a way that it appeared as if an individual had executed two ballots at the same time and placed them in the ballot box. Both ballots were executed in favor of the union.
>
> When the votes were tabulated, the Board Agent determined that the election was very close. Twelve (12) ballots were in favor of the Union; eleven (11) ballots were in favor of the Company; and five (5) ballots were challenged. Any improper balloting would have a material effect on the election.
>
> *Objection 3:*
>
> Local 929, by and through its agent, Union observer Joshua Tinnell [sic], engaged in improper electioneering within the election area. Notwithstanding specific instruction to refrain from engaging in prolonged or material conversations with any voter, Mr. Tinnell [sic] spoke to one voter and said words to the effect of 'get Cooper to come in and vote.'
>
> *Objection 4:*
>
> T. K. Harvin objects to the conduct of the election by the National Labor Relations Board, by and through its Board Agent. The agent engaged in conduct which may have materially affected the election. These items of conduct include:
>
> A. *Failure to Supervise the Ballot Box.*
>
> Throughout the voting in the Wilmington facility, the ballot box was placed on the floor of the room by the door rather than on the table (cart) within reach of the Board Agent.
>
> B. *Failure to Monitor the Voting.*
>
> As averred in earlier objections, it appears that an individual may have had an opportunity to execute two (2) ballots. On information and belief, the opportunity to engage in such improper balloting could have re-

[67] See G.C. Exh. 14, which is a bill from Pinto Brothers, Inc. dated March 25 to ''5K's Farm Market.''

[68] This conclusion is reached without considering the fact that Borrelli stopped recording her time when she started working at the Wilmington facility; and that at some point after she started working at the Wilmington facility she became office manager in customer service, taking on additional responsibilities. Also as noted above, documentary evidence available at the hearing showed that Borrelli, for a 4-week period, was paid a total of $1760 instead of the $1320 she was supposed to have received for a total of 4 weeks. While Husilton attributed the difference to overtime, he conceded that the documents in question did not show that the difference was attributable to overtime. Although Respondent did not come forward with documents showing how many hours Borrelli actually worked during the involved period, it was not necessary to rely on this matter in reaching the above conclusion.

sulted from the failure of the Board Agent to monitor the voting process.

The Employer, on brief, contends that Tunnell, the Union's observer, engaged in blatant electioneering within the polling place in violation of *Michem, Inc.*, 170 NLRB 362 (1968), and its progeny; that Tunnell instructed one voter to get another employee who had not yet appeared at the polling place; that there is evidence that Tunnell maintained a list of individuals who voted in violation of the specific instructions contained in General Counsel's Exhibit 18; that similarly Tunnell's use of the existing eligibility list to keep track of voters rather than a separate sheet of paper is also a violation of Board law; that the Board's agent's conduct raises a reasonable doubt as the fairness and validity of the election and requires that the election be set aside in that Protas failed to take the necessary precautions to secure the ballot box which may have been improperly placed on the floor; that the record evidence establishes a substantial level of commotion between voters entering the voting booth, waiting to vote, and checking in with the observers; that these factors raise a reasonable inference that the Board agent conducting the election did not take steps to prevent misconduct; that these factors, when coupled with the comments made by Tunnell during the election; require that the election be set aside.

The Union, on brief, argues that a United States Court of Appeals recently agreed with the Board in *NLRB v. WMFT*, 997 F.2d 269 (7th Cir. 1993), that a union observer's comment to another employee in the polling area to go get a named employee to come and vote did not warrant setting aside an election; that the instant case fits squarely within the Board's and court of appeals finding in *WMFT*, supra; that there is no evidence whatsoever in the record that would indicate that any single voter voted twice or cast two ballots and the Employer's objection is based solely on conjecture or speculation from the appearance of two ballots stuck together, one on top of the other, during the ballot count; that here there were not less ballots cast than voters; that there was no conduct on the part of the Board agent conducting the election which materially affected the election; that a United States Court of Appeals in *NLRB v. Oesterlen Services*, 649 F.2d 399 (6th Cir. 1981), cert. denied 454 U.S. 1031 (1981), upheld an election where, during the voting period, the Board agent absented the voting area for 10 minutes without sealing the ballots box, and the court, agreeing with the Board, found that this conduct did not affect the integrity of the box or the election; that the observers voiced no problem with the placement of the ballot box; and that after the ballot count, Protas compared the number of ballots cast with the number of voters who entered the voting area to vote, and found that they were exactly equal.

The court in *WMFT*, supra at 274, 275, indicated as follows:

> V. ALLEGED UNLAWFUL ELECTION DAY CONDUCT
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> A Board-run representation election is presumed valid and the burden is on the objecting party to prove that the election is invalid. *NLRB v. Service American Corp.*, 841 F.2d 191, 195 (7th Cir. 1988); *NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961). *WFMT*, supra, as the objecting party, must demonstrate not only that unlawful acts occurred, but that those acts interfered with the employees' exercise of free choice ''to such an extent that they materially affected the results of the election.'' *NLRB v. Chicago Tribune Company*, 943 F.2d 791, 794 (7th Cir. 1991) (citation omitted).
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> A. *Alleged Unlawful Electioneering Inside the Polling Area*
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> The Company contends that Terkel [the Union observer] engaged in last-minute electioneering inside the polling area in violation of the rule in *Michem, Inc.* and *Teamsters Local 864*, 170 NLRB 362 (1968), when he stated to Lynn Minich, ''Kurt Tyler hasn't voted. Go get Kurt to come and vote.'' In *Michem*, the NLRB prohibited electioneering during a representation election:
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> > ''Careful consideration of [the effect of conversations between parties to the election and employees preparing to vote] now convinces us that the potential for distraction, *last minute electioneering or pressure and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct*, without inquiring into the nature of the conversations. The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied ensures that no party gains a last-minute advantage over the other, and at the same time deprives neither party of an important access to the ear of the voter. . . . T*his rule is nothing more than a preventative device to enforce the ban against electioneering in polling places normally applied in political elections and in our representation elections.''*
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> *Michem*, 170 NLRB at 362–363 (emphasis added). The Board will normally set aside a representation election if the parties have violated the *Michem* rule against electioneering. *NLRB v. Del Rey Tortilleria, Inc.*, 823 F.2d 1135, 1140 (7th Cir. 1987) (citations omitted); *Midwest Stock Exchange v. NLRB*, 620 F.2d 629, 633 (7th Cir. 1980). The Company argues that Terkel's statement to Minich constituted a 'conversation' that could develop into electioneering or coercion as it potentially sent a message to other employees that someone was monitoring who had voted and might seek out those employees who had not yet voted. In addition, the Company labels Terkel's statements directing Minich to get Tyler to vote unlawful electioneering because Minich was standing in an open doorway while ''talking'' to Terkel, permitting other potential voters to overhear Terkel's statement and feel last-minute pressure to vote. Under the *Michem* rule, ''the Board will normally set aside an election if there are 'prolonged conversations between representatives of any party to the election and voters waiting to cast ballots. . . .''' *Del Rey Tortilleria*, 823 F.2d at 1140 (quoting *Michem*, 170 NLRB at 362).
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> We agree with the Board's conclusion that Terkel's statement to Minich, to ''go get Kurt [Tyler] to come

> and vote,'' did not violate the *Michem* rule because Minich was not waiting to cast her ballot, and no other eligible voters were present in the polling area when Terkel made the statement. Moreover, the Board agent immediately cautioned Terkel and Minich that she (Minich) could not instruct an employee to vote. Tyler testified that he voted without anyone telling him to vote. There is no testimony in the record that any other WFMT eligible voters, other than Martinez (WFMT observer), Stevenson and Baum (AFTRA observers) serving at the polls, overheard Terkel's statement to Minich and felt influenced or pressured to vote in the election. Because the Company failed to establish that Terkel's statement to Minich influenced or interfered with voters waiting to cast their ballots, the Board's finding that Terkel's statement did not violate the Michem rule is supported by substantial evidence.

If, as Protas testified, Tunnell spoke to a voter on his way out after voting, asking the individual if another named employee was there that day and then, telling the individual that the other employee '''hasn't voted yet,' 'if, he Protas, told Tunnell' 'not to do that, that was none of his business whether somebody voted. Campaigning was over and he shouldn't do that,''' and if, as company observer, Smith, testified, Protas told the employee who Tunnell spoke to to disregard what Tunnell said, then there would be no meaningful difference between the situation *WMFT*, supra, and the factual situation presented here. But here there is a conflict in the testimony of Protas and Smith regarding whether the individual who Tunnell talked to had voted already or was ''in the door getting ready to vote.'' Also, while Smith testifies that Protas told the voter to whom Tunnell spoke to disregard Tunnell's remarks, Protas specifically denied telling this person to disregard Tunnell's remarks. As noted above, the burden of proof here is on the Employer which filed the objections. Notwithstanding the fact that Protas may not have, in the polling area, told the voter who Tunnell spoke to to disregard Tunnell's instructions, Protas, who overheard Tunnell's remarks, did immediately tell Tunnell that he should ''not do that, that was none of his business whether somebody voted, [c]ampaigning was over and he shouldn't do that.'' Respondent did not call the voter who Tunnell directed to get another employee to determine when Tunnell spoke to him and whether he overheard Protas' statement to Tunnell and, therefore, may or may not have been placed on notice that the conduct was not acceptable. Respondent did not call the employee who Tunnell had indicated had not voted yet to determine on this record under what circumstances he appeared at the polling place to vote. It is noted that Smith testified that a couple of minutes after Tunnell made his remarks to the voter the other employee who had not voted yet showed up to vote. As noted, Smith also testified that Protas told the voter to whom Tunnell spoke to disregard Tunnell's direction to get the other employee to vote. If this is what occurred, either the voter who Tunnell spoke to disregarded Protas' admonition or the employee who had not voted yet showed up to vote without being told to do so. This is the Employer's objection. As the court in *WAFT*, supra, noted, there is a presumption of validity and the burden is on the objecting party to prove that the election is invalid. The Employer has not demonstrated facts warranting the setting aside of the election on the basis of facts established under this objection.

Contrary to the Employer's assertion on brief, there is no evidence on this record establishing that Tunnell maintained a list of individuals who voted. This allegation was not specifically included in the objections, as described above. Regarding Tunnell's use of the existing eligibility list, which both observers were checking off as the employees came to the polling area to vote, to keep track of who voted, the court in *WMFT*, supra, indicates as follows:

> The Company argues that Terkel engaged in unlawful electioneering because his references to the official list of eligible voters was equivalent to keeping a prohibited list, separate from the official list, of those employees who had not yet voted during the election in violation of the rule in *Piggly-Wiggly #011*, 168 NLRB 792, 792–793 (1967). See *Medical Center of Beaver County, Inc. v. NLRB*, 716 F.2d 995, 999 (3d Cir. 1983). We have recognized that shortly after the scheduling of an election, the employer must furnish a list of the names and addresses of all employees eligible to vote. *NLRB v. Speedway Petroleum*, 768 F.2d 151, 157 and n. 6 (7th Cir. 1985) (citing *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1961)). This official list of employees eligible to vote has become known as an *Excelsior* list. Id. In *Piggly-Wiggly*, the Board stated ''[i]t has been the policy of the Board to prohibit anyone from keeping any list of persons who have voted, aside from the official eligibility list used to checkoff voters as they receive ballots.'' *Piggly-Wiggly*, 168 NLRB at 793; see also *Textile Service Indus.*, 284 NLRB 1108, 1109 (1987); *Medical Center*, 716 F.2d at 999. The federal courts have generally recognized that ''[i]n the interests of ensuring free, non-coerced elections, the Board as set aside elections 'if employee voters know, or reasonably can infer, that their names are being recorded' on unauthorized lists.'' *Days Inn Management Co. v. NLRB*, 930 F.2d 211, 215 (2d Cir. 1991) (citation omitted).
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> The record contains substantial evidence, which we enumerate below, supporting the Board's finding that Terkel's consultation with the official list failed to ''constitute objectionable conduct'' under the *Piggly-Wiggly* rule. The WFMT observer, Martines, testified that Terkel did not keep a separate list or refer to any ''piece of paper'' other than the official list while serving as the AFTRA observer. As an election observer, Terkel's references to the official list were permissable since this list is placed in the joint custody of the election observers, and it is their duty to maintain it. See *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 326, 67 S.Ct. 324, 325, 91 L. Ed. 322 (1946); NLRB Form 722 ''Instructions to Election Observers.'' Martinez also stated that no eligible voters were present in the polling area at the time Terkel commented on who had not voted. Moreover, as we have observed earlier, Minich had voted prior to the time Terkel instructed her to get Tyler to vote. Tyler testified he voted without instruction from anyone. . . . We conclude there is substantial evidence in the record supporting the Board's decision that Terkel's comments regarding certain employees on

> the official list did not constitute unlawful electioneering in violation of the rule in *Piggly-Wiggly* because, although Terkel's behavior was highly inappropriate, the Company was unable to come forth with any evidence that it influenced the vote of any employee.

Here also the Employer did not come forth with evidence that demonstrating that Tunnell's conduct influenced the vote of any employee. Objection 3 will be overruled.

With respect to the two ballots which were taken from the ballot box one inside the other, there was no difference between the number of ballots cast and the number of voters who participated in the election; and the company observer testified that no voter entered the voting area twice nor did Protas give any voter two ballots. Also, Protas testified that he gave only one ballot to each voter. Protas' explanation of how this could have occurred is reasonable. The fact that Borrelli was not satisfied that misconduct had not occurred and that there was still a question in Smith's mind after Protas compared the number of ballots to the number of people who voted, using the checked off eligibility list, does not constitute evidence of misconduct. Saying or think it is so does not make it so. It must be shown. The Employer has the burden of proof. It did not show that there was misconduct or improper balloting procedures. Objection 2 will be overruled.

Regarding Objection 4 which relates to Protas' alleged failure to supervise the ballot box and monitor the voting, as noted above the Employer's objection regarding the ballots which were taken from the ballot box one inside the other will be overruled. The Employer contends that the placement of the ballot box on the floor approximately 5 feet from the entrance to the voting room creates doubt ''as to the sanctity of the voting atmosphere''; and that there was ''a congregation of voters in the doorway'' and ''commotion was permitted to exist in the voting place.''

As pointed out by the Board in *Rheem Mfg. Co.*, 309 NLRB 459, 460 (1992):

> In order to set aside an election on the basis of Board agent conduct, the Board must be presented with facts raising a ''reasonable doubt as to the fairness and validity of the election.'' *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

As noted above, the number of ballots cast equaled the number of voters who participated in the election at Chester. While Protas could not recall the exact location of the ballot box in the room at Chester he testified as to its general location,[69] indicating that he and the observers could see the box at all times. The Employer's observer did not object to the location of the ballot box at Chester. The observers were present during the entire voting period. The Employer presented no evidence that any voter tampered with the ballot box in Chester and the evidence of record does not support the Employer's assertion that there was ''a substantial level of commotion between the voters entering the voting booth.'' Notwithstanding the fact that Borrelli took certain of Protas' statements to mean he was referring to the vote taken at Chester, it is clear, taking into consideration his comparison of the number of ballots with the check marks on the eligibility list, and his testimony that he only gave one ballot to each voter, that, in making certain statements after the vote at Chester, Protas was not referring to the election held at the Employer's Chester facility. The Employer's Objection 4 will be overruled.

In summary, it is my opinion that all of the Employer's remaining objections should be overruled.

On the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully terminating Joshua Tunnell.
4. Respondent violated Section 8(a)(1) of the Act (a) by, on two occasions, soliciting employees complaints and grievances, and promising its employees increased benefits, and improved terms and conditions of employment if they abandoned their support for the Union; (b) by interrogating an employee concerning the employees' union sympathies; (c) by promising an employee a wage increase and an award of a dispatcher's job in order to discourage the employee's from supporting the Union; (d) by creating an impression among its employees their union activities were under surveillance by asking an employee how a union meeting had been; (e) by interrogating an employee concerning the activities of its employees on behalf of the Union; and (f) by telling an employee that another employee had been discharged because of his union activity.
5. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and that it take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent discharged Joshua Tunnell in violation of Section 8(a)(1) and (3) of the Act it is recommended that Respondent offer him immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges enjoyed by him and make him whole for any loss of pay he may have suffered as a result of the discrimination against him as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed thereon in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[70]

[69] And as noted above, he drew a diagram showing its general location in the room.

[70] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

Continued

ORDER

The Respondent, T. K. Harvin & Sons, Incorporated, Wilmington, Delaware, and Chester, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully terminating employees.

(b) Solicting employees' complaints and grievances, promising its employees increased benefits and improved terms and conditons of employment if they abandoned their support for the Union, interrogating an employee concerning the employees' union sympathies, promising an employee a wage increase and an award of a dispatcher's job in order to discourage the employee from supporting the Union, creating an impression among its employees their union activities were under surveillance by asking an employee how a union meeting had been, interrogating an employee concerning the activities of its employees on behalf of the Union, and telling an employee that another employee had been discharged because of his union activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Joshua Tunnell who was unlawfully discharged on March 29, 1993, to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Wilmington, Delaware, and Chester, Pennsylvania facilities copies of the attached notice marked ''Appendix D.''[71] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that each and every objection be overruled.

IT IS ALSO FURTHER ORDERED that Case 4–RC–18087 be remanded to the Regional Director to count the ballots of Joshua Tunnell and Glen Brightwell and to issue a revised tally of ballots and a certification of representative if International Brotherhood of Teamsters, Local 929, a/w International Brotherhood of Teamsters, AFL–CIO has received a majority of the votes cast.

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ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[71] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[BLANK PAGE FOR G.C. EXH. 4]

[BLANK PAGE FOR G.C. EXH. 5]

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